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Eminent Domain—Constitutional Law.

The latter term has an English and an American sense. They differ widely. In the United States, the term—in theory at least—means that the judges are to bring a great variety of the acts of the state and national government to the test of written constitutions—that where two written laws are in conflict, the inferior must give way to the superior—that in many instances the state constitutions must control, because they are superior, and that in others the federal constitution must, because it is paramount.

Our constitutions then are, in fact—whatever they may be in theory—what the judges say they are, hence, the same words practically mean entirely different things as interpreted at different times or by different judges at the same time. The decisions are, therefore, more inharmonious than upon almost any other topic. Of this, the whole law of eminent domain in this country, is a marked illustration. It assumes to be based upon constitutional provisions; but, for all practical purposes, it originated in the discretion of Chancellor Kent in Gardiner v. Newburgh, when no constitutional provisions on the subject existed. The habitual reverence of our profession for precedent has made this discretion of the chancellor—the purest form of arbitary power—the measure of constitutional authority.

In the troubled days since the war began, our constitutions have become mere walls of wax. With brighter days, let us hope that our courts and people will return to their tests. We have been lead to these reflections by an examination of the opinions of the majority and minority of the Supreme Court of New Hampshire, in Orr v. Quimby, 54 N. H. 590.

This was trespass *qu. cl.* It was alleged in the writ, in addition to breaking and entering, that the defendant cut down, carried away and converted to his own use seven hundred and ten trees, and one hundred and ninety-five cords of wood. The defendant pleaded, in substance, that he was employed by the United States in the national coast survey, and that what he did was necessarily done in making that survey. To this plea the plaintiff demurred. The plea was held good. In coming to this conclusion, the court decided that a state may condemn private property for the public use of the United States; that the use of the coast-survey is a public use; and that the New Hampshire statute, authorizing the taking of property for that use, and providing for the assessment of damages, but not providing for payment or security, is constitutional.

The chief interest of the case arises from the view taken of the constitutional requirement of compensation for property taken by an exercise of the power of eminent domain. "Whether there is a sufficient certainty that the damages when assessed will be promptly paid, must rest in the discretion of the court, or it must be held that payment must precede the taking or injury." p. 600.

The question "whether the prompt payment of compensation under this statute is reasonably certain" "seems to call for conclusion upon a question of fact rather than upon a question of constitutional law." p. 601. And it was held that the constitutional requirement of compensation was satisfied, because, as a matter of fact, it was reasonably certain, that, if the plaintiff would obtain an assessment of his damages by the legal proceedings authorized by the state law, those damages would be promptly paid by the United States. This result is sustained by many arguments and authorities in an able opinion delivered by Judge Hibbard, in which he says that the framers of the constitution of New Hampshire appear to have reposed so much confidence in future legislatures and courts that "they were not sufficiently solicitous on the subject of compensation to insert any provision respecting it;" that the constitution of New Hampshire is silent upon this point, and that the requirement of compensation is implied as a dictate of natural justice. This doctrine is announced in 3 N. H. 524, 535, and is recognized in several other New Hampshire cases. It seems to be understood as allowing the court to be satisfied with a reasonable certainty of compensation, found as a fact by the court; to dispense with rules of a strictly legal character; and leave the whole subject to judicial discretion, upon an equitable consideration of the chances of voluntary compensation in each particular case.

In this view Judge Doe does not concur. Six pages of his opinion (605—611) are devoted to the question whether a statute authorizing the taking of private property for public use without compensation, can be held void on the ground that natural justice speaks on a point on which the constitution is silent; and twenty-seven pages (611—638) to the question whether the constitution of New Hampshire is silent on the subject of compensation. He concludes that the court is not authorized to administer the higher law of natural justice, (a question much discussed by counsel in their argument before the New Hampshire court in the celebrated Dartmouth College case, and in several subsequent cases in that state), and that compensation is required by the general declaration of the rights of life, liberty and property, in the Bill of Rights. "Eminent domain is the public power of making a compulsory purchase of private property for public use; and payment is an essential part of the legal idea of a purchase, voluntary or compulsory. Voluntary, and without payment, it is a donation; compulsory, and without payment, it is robbery." p. 611. "The right of acquiring and purchasing property is reserved in the second article of the Bill of Rights; and robbery is a violation of that right." p. 638.

The constitutional history of the "custom" of slavery is one of the strongest objections to this construction of the general declaration of natural rights. And the full force of this objection is acknowledged by the dissenting judge, and is met in a direct and straightforward manner. The meaning of the doctrines, described by Mr. Choate as the "glittering generalties of the Declaration of Independence," is investigated fearlessly, but dispassionately. Whether we accept the result or reject it, and whether we have been on one side or the other of any of the political questions of slavery on which the country has been divided, we can find no fault with the temper in which the delicate subject is here treated. And we are encouraged to hope that the time has come when the legal views of some of our private rights is to be freed from the disturbing influences of the controversy that was terminated by the 13th amendment. There being no longer any occasion for the heated debates and extreme opinions that formerly prevailed, we may reasonably expect a judicial development of constitutional law, in some respects, more satisfactory to all parties, than has heretofore been possible. A movement in that direction is made by Judge Doe's discussion of the question of higher law and glittering generalities involved in this case. And it seems to us that this opinion is little less than a moral demonstration that Mr. Bancroft and a long array of opinions of the Supreme Court of Massachusetts, are palpably in error.

Coming to the conclusion that compensation is required by the general declaration of the right of property, he proceeds to enquire (p. 638), whether the requirement of compensation is complied with when the court is satisfied that,

as a matter of fact, the prompt payment of damages is reasonably certain. A few extracts will give some idea of the ground on which he answers this question in the negative, and holds the plea bad.

"The constitutional reservation of the right of proprietorship is nullified when property is taken, as the plaintiff's was, without payment, legal security, or legal obligation to pay, leaving the owner entirely helpless, at the public mercy, as he would be if his right were only a moral and not a legal one. That would be his predicament if there were no constitution and no law. * * The effect of the decision is that the plaintiff is no better off, in law, than he would be if the constitution, instead of reserving the private right of ownership, had expressly relinquished it to the public in these words: 'Private property may be taken for public use without compensation.' If the constitution had made that surrender, the public could pay the plaintiff or not, as it pleased. As the constitution is now, under the decision, the public has the same option. In other words, the plaintiff's right is precisely the same, whether the constitution reserves and guarantees it, or conveys it away and authorizes its annihilation." p. 640. "This case is no exception to the general rule, that the legal character of a right is something more than a hope or faith that the right, incapable of being maintained by the proprietor, either with or without process of law, will be respected by those who can violate it with impunity." p. 649. "The constitution does not require an impossible or legally difficult thing to be done. It does not require compensation to be made before the amount of it can be ascertained, nor require it to be secured in any impracticable manner. But it reserves the right of owning property; that right requires compensation; and compensation, if it can not be made when the property is taken, requires security to be given; for otherwise, compensation may never be made." p. 643. "There is no apparent difficulty in providing, by statute, a procedure, simple in form, and speedy, easy, and flexible in operation, by which the public can enjoy its right of taking property for the coast-survey, without impairing the owner's enjoyment of his right of acquiring and possessing property." p. 645. "The discretionary theory of Chancellor Kent has been inadvertently followed instead of the legal theory of the constitution. * * * The question of law being decided as a question of fact within the discretion of the court, the natural consequences have ensued. Moral suasion is substituted for legal force; moral probability takes the place of legal security; faith in the public conscience and public treasury, supersedes legal remedies; the right of owning property dwindles into a right to beg for compensation; the constitutional reservation is abolished by a presumption that the public will not violate it." p. 649.

Title by Estoppel.

The following is from advance sheets of the 2nd, ed. of Bigelow on Estoppel, chap. 11:

The subject upon which we now enter presents the most remarkable and the most complicated doctrine in all the "curious learning" of estoppel. An estate by estoppel arises, in general terms, in a case where a grantor, without title, makes a lease or conveyance of land by deed with warranty, and subsequently, by descent or purchase, acquires the ownership; which after-acquired title of the grantor *enures* (in common phrase) by estoppel to the benefit of the grantee. And this is the doctrine which we are now to examine and endeavor to explain.

By the old common law, only four kinds of assurances possessed the efficacy to pass an after acquired estate, the feoffment, the fine, the common recovery, and the lease. The last named is the only one of these that has come down to us and is now in use. The common recovery long since became obsolete, and seems to have left little or no trace of its existence in America. The fine was substantially an acknowledgment of a feoffment of record, but we pass it as affording no independent aid to our present enquries, and proceed to the consideration of the first mentioned and most important species of assurance, the feoffment.

This manner of conveyance, it is said in the Touchstone,* was the most ancient kind of conveyance, and in some respects exceeded that by fine or recovery; for it was of such a nature and efficacy, by reason of the livery of seisin ever inseparately incident to it, that it removed all disseisins, abatements, intrusions, and other wrongful and defeasible titles, and reduced the estate clearly to the feoffor, and through him to the feoffee, when the entry of the feoffor was lawful; which neither fine, recovery, nor bargain and sale by deed indented and enrolled would do, when the feoffor was out of possession by disseisin. And the learned editor of the Touchstone, Mr. Preston, in a note to this passage, says that to make a feoffment good and valid nothing was wanting but possession; and when the feoffor had possession, though entirely naked, yet a freehold or fee-simple passed by it, as against the feoffor, by reason of the livery.

The feoffment passed not only all present estates and interests of the feoffor, but also barred and excluded him (and his heirs prior to the statute *de bigamis* † and *quia emptores* ‡) from all future estates, rights, and possibilities in favor of tho feoffee.§ This effect of barring all future interests was produced, it is said, by the presence of the word *dedi* in the charter of feoffment, which word imported a warranty to defend the estate.‖ We must now ascertain the character and operation of this ancient warranty.

As defined in the work to which we are constantly referring,¶ the warranty was a covenant real, annexed to an estate of freehold or inheritance, whereby a man and his heirs were bound to warrant the same, and either upon voucher or by judgment in a writ of *warrantia chartæ* to yield other lands and tenements to the value of those of which there should be an eviction, in which case the party received a compensation for the lands lost: or the warranty might be by way of rebutter, in which case it operated as a defence to the possession.**

The effect of the warranty was to bar and conclude the warrantor personally, and before the statute already mentioned, his general heirs, as distinguished from heirs in tail, of the land so warranted forever, so that all the rights, present and future, were bound.†† "And, therefore," in the example given in the Touchstone, "if th efather be disseised, and the son in his life-time release all his right to the land to the disseisor, and make a warranty in the deed and then the father dieth, and the right descendeth to the son, albeit the release doth not bar the son yet the warranty doth bar him."

* Page 203.

† 4 Edw. 1, ch. 6.

‡ 18 Edw. 1, ch. 1.

§ Touchstone, 204.

‖ Ib. 184; Coke, Litt. 383, 384.

¶ Touchstone, 181.

** The subject is more fully explained by Blackstone. "By the feudal constitution," he observes, "if the vassal's title to enjoy the fee was disputed, he might vouch, or call the lord or donor to warrant or enure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense. And so by our ancient law, if before the statute of *quia emptores* a man enfeoffed another in fee by the feudal verb *dedi*, to hold of himself and his heirs, by certain services, the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift), were originally stipulated to be rendered. * * * But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs; because it is a mere personal contract on the part of the feoffer, the tenure, and of course the ancient services, resulting back to the superior lord of the fee." 2 Black Com 300.

†† Touchstone, 182.

In the case of assets, the warranty, if lineal, was a bar of an estate in tail against the heir; and if the warranty was collateral, it was a bar with or without assets (except in cases provided for by statute) of an estate in fee-simple or fee-tail, and all possibility of right thereunto.

A word is necessary as to the perplexed subject of collateral warranty. This mode of assurance (for such it was) arose after and by reason of the passage of the statute *de donis conditionalibus*. Previous to that act, or rather previous to the statute of Gloucester, passed a little earlier, the heir was in every case bound by the ancestor's warranty. As a covenant real, the warranty descended upon him and bound him, even though he claimed a title from a third person. These statutes were intended respectively to relieve the heir from such injustice, and to establish entails. The statute of Gloucester protected the son of tenant by the curtesy from the father's warranty. He was now safe when he claimed title from his mother. The statute *de donis* went further, protecting the son generally from the father's warranty; but this was the extent of the protection. The doctrine of warranty still prevailed in other cases;* and so, when it happened that the son was heir also of one who was collateral to the title to the land in question, as where he was heir of his uncle as well as of his father, it was only necessary for the collateral ancestor to make a warranty of the land. This descended still upon the heir and bound him to warrant just as it did before the statute. This was the contrivance invented by the ingenuity of Sir Thomas More to avoid the effect of the above named statutes; and it was called collateral warranty. The warranty was collateral to the title; not necessarily, it should be observed, collateral to the blood. The father's warranty might be collateral as well as the uncle's in the case above put; as where the title to the land had been in the uncle, and his nephew was his heir.† Thus was an entail effectually barred; and this evasion of the policy of feudalism, modified by modern statutes, was a recognized mode of assurance in England until within about forty years of the present time.‡

And in either sort of warranty, lineal or collateral, if the warrantor should implead the warrantee, the latter, the tenant, might show the warranty and demand judgment whether, contrary to the warranty, the warrantor should be suffered to demand the thing warranted; and this was called a rebutter. This rebutter was given as a defence to the title to avoid circuity of action; since if the demandant were to have recovered, contrary to the warranty, the other party would recover the same lands, or lands of equal value, by force of the warranty.§

The warrantee again might, at any time before he was impleaded for the land, bring a writ of *warrantia chartæ* upon the warranty in the deed, against the warrantor or his heirs; and by this proceeding all the land that the heir had from the ancestor was bound and charged with the warranty, in the hands of all persons to whom it should afterwards go, from the impetration of the writ; so that if the land warranted should afterwards be recovered from the warrantee, he should be entitled to recover of other lands of the heir, or of the warrantor if living.*

These observations are sufficient to show that the old common law warranty was wholly different in character from the covenants now in use in the conveyance of real estate. The old warranty, before the statute *de donis*, ran with the land and operated against the heir regardless of assets from the feoffor; and after the statute, the same was true of collateral warranty. The modern covenant affects only the grantor, unless first the heir have assets from him, and then only to the extent of such assets, or unless, secondly, the heir claim the land *quasi* heir of the grantor; in which latter case the land would itself become assets in the hands of the heir (if he were allowed to recover), with which he must, as in the other case, respond to his ancestor's covenant of warranty.†

The policy of the law, it will thus be seen, is to prevent a circuity of action. If the heir, having assets from his father, the grantor, were to be allowed to recover the land which the father had conveyed with warranty, though the title had come to him from his mother or from any other collateral source, he would be compelled at once to respond to his father's covenant, to the extent of his assets (not exceeding of course the value of the land); so that he would be in no better position in a pecuniary aspect, which alone the law regards, after the litigation than before. The law therefore wisely holds him estopped, or more properly, rebutted, from claiming the land. And the same would be equally true if he should claim the land *quasi* heir of his father (under a title acquired by the father after the conveyance) regardless of assets; for the land, if a recovery were permitted, would itself become assets.

This is upon the supposition that the warranty is in the usual general form for the grantor, his heirs and assigns; but if the warranty should be personal only, and not for the heir also, the latter would not be barred, even with assets, from claiming the land from another source, as from his mother; since this would be no breach of the warranty, and there would be no place for a rebutter. He could not, however, claim the premises *quasi* heir of the grantor in this or any other case, for as such a claimant he would be in privity with the grantor, and would be estopped accordingly.

Thus much as introductory to what we have to say upon the existing law, and as showing the origin of the doctrine of title by estoppel. We shall recur to the subject hereafter in detail, in discussing the respective rights of a grantee before title acquired and a grantee after, under our existing modes of conveyance. We turn now to the modern doctrine; and first of leases by estoppel.

[CONCLUDED NEXT WEEK.]

* And it was held still to prevail if the heir received by descent another estate from the ancestor equal to that conveyed by the latter. 2 Inst. 293; Rawle, Covenants, 6, 7, 4th ed.

† No part of the law is more complicated than this subject of collateral warranty has been *made*. "If Littleton," said Vaughan, C. J., in Bole v. Horton, Vaughan, 375, "had taken that plain way in resolving his many excellent cases in his chapter of warranty, of saying the warranty of the ancestor doth not bind in this case because it is restrained by the statute of Gloucestor or the statute *de donis*, and it doth bind in this case as at the common law because not restrained by either statute (for when he wrote, there were no other statutes restraining warranties, there is now a third, 11 H. 7), his doctrine of warranties had been more clear and satisfactory than now it is, being intricated under the terms of lineal and collateral; for that in truth is the genuine resolution of most, if not of all, his cases. For no man's warranty doth bind, or not, directly, and *a priori*, because it is lineal or collateral, for no statute restrains any warranty under those terms from binding, nor no law institutes any warranty in those terms. But those are restraints by consequent only from the restraints of warranties made by statutes."

‡ See 4 and 5 Anne, c. 15. Warranties and real actions generally were abolished by 3 and 4 Will. 4, c. 27, § 39; Ib. c. 74, § 14. See further, as to collateral warranty, Rawle, Covenants, c. 1; Russ v. Alpaugh 118 Mass.; Southerland v. Stout, 68 N. C. 446. Collateral warranty as it stood before the St. 4 and 5 Anne probably never prevailed in this country. Ibid.

§ Coke, Litt. 265; Touchstone, 182.

Title by Adverse Possession—The Rule in Gibson v. Chouteau. Another Review of McRee v. Copelin.‡

In this case a long and able decision is rendered by Judge Jones, in the general term, which is designed to establish as law the proposition "that the adverse possession of a tract of land embraced in a favorable decision of the old board of commissioners, or covered by a New Madrid relocation, after the return of the plat of survey to the recorder, for the period of time fixed in the statute of limitations of this state, transfers the title to the possessor, so that he becomes through the operation of the statute,

* Touchstone, 184.

† See Russ v. Alpaugh, 118 Mass., a valuable case, not yet reported.

‡Reported, 2 CENT. L. J., 813.

the *legal representative* of the original claimant, and is consequently the patentee under a subsequent patent issued to the original owner or his *legal representative*."

This proposition was maintained by Judge Jones in the recent case of Hammond's Heirs v. The Heirs of Peter Lindell (Hammond v. Coleman, 2 CENT. L. J. 359), though not so elaborately reasoned as in the case now under review.

It is said by the court that there is nothing in Gibson v. Chouteau, 13 Wall., when properly understood in antagonism to this declaration of law.

That the statute of limitations transfers the title to the occupant, as effectively as a conveyance from the true owner would, seems to be the settled doctrine of this state. As a consequence the statute will run against an equitable owner as effectively as against the legal owner by patent or confirmation by act of Congress carrying the fee, and therefore equivalent to patent. It not only bars the entry and transfers the legal right of the patentee or confirmee, but operates equally against him who has a right to call upon the legal owner, to perfect an equitable right he has, and transfer to him the title; and for the same reason, that is, that the fee having passed from the sovereign, the land, whether claimed legally or equitably, is as subject to the laws of the state as any other property. The proposition of Judge Jones, adopted in general term, however, is no novelty, but, in its application to cases of the character named, has been expressly overruled by the Supreme Court of Missouri, where the question was earnestly raised. In the brief filed by the defendant's counsel in the case of Gibson v. Chouteau, 39 Mo. 550, it is urged "that such a continuous, notorious and adverse possession is as operative to pass to and vest in Mr. Chouteau the equitable inchoate right and claim to the location as any conveyance." The same point is pressed upon the court at the rehearing, page, 576. The reply of the court is very significant, and is as follows (page 586):

"The question whether the plaintiff's action was barred by the statute of limitations, has been reargued on the part of the defendants, upon the same grounds that it was before. It seemed to be supposed then, as it is now, that the location *alone*, when made in 1841, operated as an exchange to pass the title out of the United States, and that therefore the statute, beginning to run from that date, would be a complete bar to the plaintiff's action. No legal theory, no principle of law, was ever suggested, nor has been now, on which it was conceived that such a result could possibly take place. It was said in the former opinion that until the patent issued, the legal title remained in the United States, and the statute of limitations did not begin to run against the plaintiff before the date of the patent."

In the decision of the Supreme Court of the United States, in the same case, 13 Wallace, these principles of law were approved. So if the case of Gibson v. Chouteau, may be properly characterized by Judge Jones as an "unfortunate case," and that it may be discovered on a closer examination that Justice Field's observations in the case "are either erroneous assumptions as to the law of adverse possession of this state, or such merely one sided *obiter* remarks as might naturally be expected from one energetically combatting the doctrine of relation," we have only to urge that the same "misfortune" overtook the supreme court of this state, and that it indulged in the same "erroneous assumptions as to the law of adverse possession of this state"; for both the Supreme Court of Missouri, and that of the United States agree entirely in opposition to the proposition of law sustained by the General Term.

The whole confusion arises from the fact that there is not on the part of the General Term a correct judicial definition of the terms "equitable title" and "legal title."

There can be in law no "equitable title" to transfer by the operation of the statute of limitations, unless a "legal title" first exists. An "equitable title" vests in the owner thereof the right to call upon the "legal title," to come to its support, and allow it to be merged in the "legal title." An "equitable title" for its enforcement has all the safeguards of the law that surround a "legal title," to be asserted only in a different tribunal. But a "legal title" must first exist in order that an "equitable title" may be carved out of it. To have an "equitable title" without power in the law to enforce it, seems a judicial anomaly. But it is through this very misfortune which has overtaken the General Term in treating the inceptive act in the location of a New Madrid certificate, or even its return to the recorder of land titles, or a confirmation of the old Board under the act of 1807, ascreating an "equitable title," judicially understood that the conclusion has been reached by the General Term at which it arrives. In each of the cases above named, the "legal title" still remains in the United States, it never having parted with it, and as the "equitable title" must always be carved out of the "legal title," the result is, that a party has an "equitable title" in that which legally belongs to the government. There is no process known to our system of jurisprudence by which such title could through the law be made available to the supposed owner of this "equitable title," nor is there any means known to the law by which an individual can become "equitably" seized of land the fee of which has never been parted with by the government.

A recurrence to elementary principles should have protected the General Term from their conclusions. Every title in fee to land within territories ceded to the United States must be derived through a complete grant by patent from the former sovereign, or must emanate from the *political power* of the United States. In Missouri there are but six *complete* grants from Spain—none from France, therefore every other land title in Missouri owes its existence to the *political power* of the United States, exercised through Congress, the channel named by the constitution through which it is expressed. This will be recognized by every intelligent lawyer, not only as the theory of our government touching the disposition of lands, but to be in accord with the repeated decisions of the Supreme Court of the United States. By the Treaty of Paris the United States succeeded to the fee of all the lands in Missouri except in the six instances named; assuming the obligation to protect the new citizens "in their liberty, property, and the religion they profess." Out of this obligation grew the appointment of commissioners to examine titles, and the various confirmatory acts since passed by Congress in relation to lands. Some of these acts, as that of 1812 and 1816, have been held by the courts to vest *the fee* in the confirmee by their own force; but such confirmee has never been supposed to hold his title under any other sanction than that of the United States. Other acts are so framed as to require a patent to vest the fee—as the act of 1814. Again, other titles had their inceptive American *recognition* in the act of the board of commissioners under the law of 1807, which act does not pretend to pass the fee (Burgess v. Gray 16 How.,) but provides particularly how the beneficiary under the action of the commissioners shall secure the fee simple title to the land. As to all other lands, the general system for the disposal of the public lands prevails, by which the purchaser pays his money and receives from the land office a duplicate certificate of such payment—the original is sent to Washington, a patent issued upon it and returned to the register, who, upon the surrender of the duplicate certificate, delivers the patent to the patentee, who then acquires the title. But none of these processes create an "equitable title," in its judicial sense. Until the patent issues, the confirmee in the one case, and the purchaser in the other, have an equitable right, or claim to invoke the political power acting through two of its agencies, the land department and the president, to pass the title of the United States by patent. In many instances this political

power has refused such prayer and cancelled the duplicate certificate and returned the purchase-money, and its action has been sustained by the courts. There can be no "equitable title" vested in a citizen to lands, the fee of which has never been parted with by the United States. Hence it is error to suppose that there can be an "adverse possession" of such title; wherever an inceptive step has been taken or an act done under the authority of an act of Congress, to procure the fee simple to lands of the United States, such acts are all under the control of the general government until it has finally consummated the title by patent, and any such possession, which, if the fee had passed, would be "adverse" to the individual, is in subordination to the title of the sovereign, and consequently adverse to no one. The "adverse possession" of an "equitable right or claim to demand of the political power the consummation of a title by patent" is not, in my mind, a very safe foundation of title. The power of transferring an existing "equitable title" to the adverse possessor under the statute of limitations, cannot be denied; but it is because such "adverse possession" transfers the "legal title," and thereby extinguishes, or rather merges the "equitable title," which is an incident in the new title created by operation of the statute, and both pass together.

The first judicial enunciation of this novel doctrine of transferring through the statute of limitations "the equitable right or claim of a party to call upon the political power to complete his title," so as to give the possessor the right to be treated as his "legal representative" through the patent issued by that political power, was in the case of Hammond vs. Lindells' Heirs (2 CENT L. J. 359). The constitution of Missouri declares "that the legislature shall never interfere with the primary disposal of the soil, nor with any regulation that congress may find necessary for securing the title in such soil *to the bona fide purchasers.*" Now let us suppose that the legislature should enact that "whereas the United States have heretofore refused to recognize as legal certain New Madrid claims in this state and have therefore refused or failed to issue patents therefor to the locators claiming to be the legal representatives of the original owners; therefore be it enacted that any and every person who, for ten consecutive years after the passage of this act, shall be and continue in the actual adverse and peaceable possession of such claim or claims, shall, when said patents are issued, be deemed and held to be the 'legal representative' of such original owner to the extent of his possession, and, in virtue of such adverse possession, shall be held to be the patentee thereof as legal representative, within the meaning of such patent," would not such a law be held by the court as "an interference with the primary disposal of the soil," or of the prerogative of the general government of "securing the title in such soil to the *bona fide parchasers?*" If it would, which to my mind is clear, upon what principle can judicial construction of a law be allowed to accomplish that, which is forbidden to the law itself? Yet it is a construction in its effects identical to the results which would be produced by the above law which, is adopted by General Term.

The federal courts are especially created for the benefit of citizens of different states. A citizen of South Carolina for instance, has a connected paper title to a New Madrid location. The land department refuses to recognize it, and issue the patent. In the language of the Supreme Court of the United States "the consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government." After a lapse of forty years the government perfects the title, either by special act, or by patent. The owner of the paper title for the first time has a cause of action which the federal court will recognize, and, upon instituting his suit, is confronted by a judical interpretation of the statute of limitations by the courts of the state, which has given his title to a trespasser, and yet when the federal court says, "you can not interfere with the primary disposal of the soil by this agency, and give to a naked trespasser that which has been given to a *bona fide* purchaser," who is not in default, for not having sooner prosecuted his claim, it being the fault of the government that his rights have been so long in abeyance, and it is the duty of the courts of the government to see that he shall enjoy them,—we are met with the judicial declaration in Missouri, that such justice is very "unfortunate." It may be so to the trespasser; but it is quite fortunate to the legal owner of the land in South Carolina.

But it is said by the Supreme Court of Missouri, Napton, J., in a recent case, in which the doctrine of Gibson v. Chouteau is reluctantly adopted, and the judgment of the court in General Term which I am now reviewing, is overruled, (McElhenny v. Fiske, 2 CENT. L. J., 917), "that it has always been understood in this state, that the law giving a possessory action upon the inceptive right, or initiatory step towards procuring a title, was in aid of the United States, and was supposed to facilitate the purpose of the general government by giving the purchaser an advantage which those who bought from private proprietors did not have." The very distinguished jurist who delivered that opinion, must have overlooked the fact that the federal courts can not accept the assistance of the legislature of Missouri to "facilitate the purpose of the general government in disposing of the public lands," by recognizing the right of action for possession upon the initiatory step to procure title to the same. The question involves state power over the subject; and if it be admitted by the federal courts that the power exists to aid the United States in the disposal of their lands, the question is surrendered, when its exercise becomes only a question of discretion, which may confront the federal law and courts as it now does with its exercise to *embarrass* the *primary* disposal of the public lands, by making a "naked ten year trespasser" the owner of that which the United States designed to give by patent to the rightful owner, in the language of the state constitution, "the *bona fide purchaser*" thereof. The true theory of these cases and of the law is, that the United States in the primary disposal of the public lands is entirely independent of the laws and courts of Missouri, and the sooner this principle is recognized, the sooner the evil deprecated by Judge Jones will be dispelled, and conflicting claims settled.

If these views are correct, it follows necessarily, that the United States courts can never recognize as law, that the state of Missouri has any power either to *facilitate* or *embarrass* the primary disposal of the public lands, and their enjoyment by the "*bona fide* purchaser," whether it is exerted by way of facilitating its occupancy by giving the action of ejectment upon the initiatory step to procure title, or by *embarrassing* the same, and through construction of the statute of limitations, thrusting a trespasser in the stead and place of such "*bona fide* purchaser." This is the legal lesson that has been taught us for forty years past, but more emphatically in the case of Gibson v. Chouteau, 13 Wallace.

When the United States passes her legal title, the land not only becomes subject to state law, but exposed to the vicissitudes of judicial construction of the same. Until then the laws of the United States, expounded by the federal courts, are the only rule through which the ownership is to be determined. It is rather amusing to observe the definition by the General Term, of the estate created by this "equitable claim of right to call upon the political power to protect the inceptive act by patent," which is supposed to pass to an intruder for ten years. The court says: "We may call it an imperfect, an inchoate, or an equitable title or estate, what it actually is, we very well know." And yet we don't know what to call it. "It passes by descent, by will, by deed, by estoppel, and may be seized and sold on execution;" therefore the court concludes it may pass by

"adverse possession." Let it be admitted, which is true, that the right to ask for a patent upon steps taken to secure title, possesses all the incidents attached to it, designated by the court, these incidents are all creations of municipal law, not forbidden to the legislature by the state constitution, for none of them are "interferences with the primary disposal of the soil," "*or with the securing the title in such soil to the bona fide purchasers.*" Certainly the heir, devisee, or purchaser under execution or deed may, and would be regarded as the "*bona fide purchaser*" under the state constitution, and the laws may aid him without violating the same, or interfering with the federal sovereignty in disposing of the public lands. Indeed this is no new question. As early as 1816, Richard Rush, Attorney-General, gave the opinion that the patent might issue directly to a purchaser at sheriff's sale under the laws of the Illinois territory. But there is a marked distinction under the Missouri constitution between laws which preserve the status of the "*bona fide* purchaser," and judicial construction, which substitutes a trespasser for the "*bona fide* purchaser," and when the title of the land purchased is perfected by patent, thrust and intrudes a stranger to the title into his place as *bona fide purchaser*. And that is exactly what was done in the case of Hammond vs. Lindell's Heirs, (*supra*) and now again more elaborately by the same judge in General Term.

Much stress is laid upon the fact that the patent in the case of Gibson v. Chouteau, was issued to "Mary McRee by deraignment of title," and that therefore the executive department had passed upon all the equities, even title by adverse possession, and fixed the fee in Mary McRee. This is certainly a strange conclusion of the court, in view of the fact that the Supreme Court of Missouri, in 39 Mo., passed upon all the equities of the case as then before them, and resolved them all in the favor of the plaintiff. What is the legal difference in a patent to "Mary McRee by deraignment of title, assignee of J. Y. O'Carroll," and one issued to "Mary McRee, assignee, of J. Y. O'Carroll?" None in the world. Judge Jones, sitting as a chancellor, would decree the legal title, under either patent, to be in the owner of the superior equity, upon a proper case made before him. I regret to see an intelligent court speaking of this mode of issuing patents to "assignees," as "acts of the executive officers of the United States, *in defiance of every rule of propriety*, presuming to pass, of course, upon an *ex parte* demand for a patent, upon all matters bearing upon the derivative title." Again: "Where the executive officers of the United States, in their *caprice* (and scarcely ever can it be anything *but caprice*) select one of several claimants," etc., etc. If the court will examine the act of Congress, of May 10, 1800, organizing the land office department, it will find by the 7th section that in issuing patents, "the President of the United States is hereby authorized to grant a patent for lands to the said purchaser, his heirs or assignees" (2 U. S. St. p. 76), and that in 1829, Berrien, Attorney-General, in the case of James Berwick, advised such patents. The writer of this article has eight patents in his possession issued to "assignees," commencing with the administration of James Monroe. The constitution enjoins upon the President the duty of seeing the laws faithfully executed. The President it is who issues the patent. The courts protect the rights of parties under the patent when issued. So the responsibility of reversing the case of Gibson v. Chouteau by the General Term can not be escaped by the *form of the patent*. But has the General Term deliberately disregarded the decision of the Supreme Court of the United States in Gibson v. Chouteau? It is very clear that it has, and it anticipates, in its comments upon Langdeau v. Hanes, 21 Wallace, that the Supreme Court of Missouri and of the United States, will each in the end, see the error of their ways and conform to the doctrine of the General Term. The Supreme Court of Missouri will soon have an opportunity of passing upon Judge Jones' positions, on a case appealed from his ruling, where he conformed to Gibson v. Chouteau. The case stands for hearing at a very early day, and it is hoped counsel will press the views of the General Term, and that the supreme court may find it in the record to pass finally upon the points made by Judge Jones, which I have already shown have been repudiated in 39 Mo., by the supreme court itself.

The only question before the Supreme Court of the United States in Gibson v. Chouteau, was whether the supreme court of this state decided correctly when it declared that Chouteau's twenty-three years possession before patent, of the land located by a New Madrid certificate, defeated the action of Mrs. McRee on the patent. If that court had held that the possession was *adverse*, then the doctrine of the General Term that it transferred the title through the operation of the statute of limitations, would have enabled Chouteau to defeat the action under the Missouri practice; for he would have been the party by his superior equity, entitled to claim the legal title passing by enurement, as was ruled in Landes v. Brant. But the court must have held, as every court in the end will hold, that possession under such circumstances is in subordination to the sovereign, and when the sovereign passes the title by patent, the possession of the intruder goes with it, to the party rightfully entitled to the title and possession from the United States.

The decision in Gibson v. Chouteau is but a reiteration of the law held by the Supreme Court of the United States ever since the question first arose before that tribunal. In the opinion, Mrs. McRee's name is not mentioned, nor is the form of her patent even alluded to. It is stated that all the equities arising in the case had been resolved by the Supreme Court of Missouri in favor of the plaintiff, of course embracing "adverse possession" and its consequences. The naked question presented was, can the statute of limitations be made available as a defence? And the court in a very clear and exhaustive opinion decides that it cannot. Every sentence in the opinion is not only incisive, but it is worthy that august tribual, standing in defence of a "*bona fide* purchaser" from the government against an intruder upon the public lands. The character of the decision is just what might have been expected if the United States, in whom the title vested, was suing for the possession of the land. In such a case what would the General Term have ruled as to "adverse possession?" And would it deny that the patentee was clothed with all the rights, which the United States could enforce? The remarks of Judge Field which are called "*obiter*" were all germain to the question, "can an intruder, a stranger to the initiatory step to procure title, defend himself, against the patentee by an adverse possession before the issuing of the patent?" This was the simple question presented by the record, and on it the supreme court conforming exactly to Judge Holmes decision (leaving out "relation"), in 39 Mo., says amongst other things: "The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation *depriving the grantees of the United States of the possession and enjoyment of the property granted* by reason of any delay in the transfer of the title, *after the initiation of proceedings for its acquisition.* The consummation of the title is not a matter which the grantees can control but one which rests entirely with the government. With the legal title when transferred *goes the right to possess and enjoy the land*, and it would amount to a denial of the power of disposal in Congress, if these benefits which should follow upon the acquisition of that title could be forfeited because they were not asserted before that title was issued." Could there be a clearer or more just exposition of law than this? Again: "The doctrine of relation is a fiction of law adopted by courts solely for the purposes of justice, and is only applied for the security of persons who stand in some

privity *with the party that initiated proceedings for the land*, and acquired the equitable *claim or right to the title*, [the court is cautious not to call it an "equitable title."] The defendants in this case were strangers to that party and his *equitable claim*, or *equitable title, as it is termed* [by the court below], not connecting themselves with it by any *valid transfer* [descent, will, deed or sheriff's sale of the General Term], from the original or any subsequent holder. *The statute of limitations of Missouri did not operate to convey* that *claim* or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon under the practice of the state. It left the right of entry upon the legal title subsequently acquired by the patent *wholly unaffected.*" Could language more conclusive or expressive of the judgment of the court have been employed against the decision of the General Term? The supreme court well knew that under our system of practice an equitable title, set up by a plea in proper form, if established, is a good defence to an action brought upon the naked legal title by patent, and in referring to this defence, the court says: "But neither in a separate suit in a federal court, *nor in an answer to an action of ejectment* in a state court, *can the mere occupation* of the demanded premises by plaintiffs or defendants *for the period prescribed by the statute of limitations of the state* be held to constitute *a sufficient equity* in their favor *to control the legal title subsequently conveyed* to others by the patent of the United States without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by *any occupation* of the premises *before the issue of the patent*, under state legislation in whatever *form* or tribunal such occupation be asserted." The supreme court was laying down a rule of real property law, universal to the whole country, and not designed especially for this locality. It is consistent with the genius of our laws, eminently equitable upon the part of the United States, and just to its grantees, and can be complained of only by trespassers, who, without right or title connecting themselves with the owners of the "initiatory step to procure title," have "jumped" the lands of others. To such it may be an "unfortunate decision;" but it was made nearly forty years ago, and has been adhered to ever since, whenever the question has arisen. It is simply a declaration that by no process of legislation can a state interfere with the *primary* disposal of the public lands, and that a court will not be permitted by construction of a statute, to accomplish that end, denied to the law itself.

So jealous have the federal courts been of this state interference, that in the case of Irvine v. Marshall 20 Howard 558, they have condemned it in unqualified terms. The case was this: An act of the Minnesota legislature, abolished "resulting trusts," and declared the fee to be in the trustee, discharged of any resulting trust. At a sale of public lands two men paid each $100 to a third, with which to buy in his own name for their joint use a quarter section of public land—the trustee, relying upon the Minnesota law which gave the fee to him, discharged of the trust, determined to convey the entire quarter section to one of the parties. The Supreme Court of Minnesota decided he had the right to do so. Upon writ of error to the Supreme Court of the United States, it held as law all the propositions I have insisted upon, and reversed the judgment of the court below. In that case the court say: "It cannot be denied that all the lands in the territories not appropriated by competent authority before they were acquired are, in the first instance, the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles as the government may deem most advantageous for the public fisc, or in other respects most politic. The system adopted for the disposition of the public lands, embraces the interest of all the states, and proposes the equal participation therein of all the people of all the states. This system is, therefore, peculiarly and exclusively the exercise of a federal power. The theater of its accomplishment is the seat of the federal government. The mode of that accomplishment, the evidences or muniments of right it bestows are all the work of federal functionaries alone. Are these things in any way compatible with the claim to prescribe to the United States *the modes or the extent to which* they may dispose of their property, or with the denunciation of a *forfeiture as the consequence of a departure from such pretension?*" Again: "With regard to the positions that the right acquired by the purchaser of a certificate *bona fide* made is *property in the vendee even before the emanation of the patent*, and that some of the states [as Missouri] have permitted suits at law to be instituted on certificates of purchase, it is not perceived that the concession of either or both of these positions can in any degree impair the right of the United States to contract upon their own terms for the sale of their own property, or diminish their obligation in the fulfillment of their contract in good faith to convey to their vendee the subject for which he has paid them. There certainly can exist nowhere a power to compel them to convey to any person, and much less to require of them the perpetuation of a fraud in behalf of one in whom no *shadow of a valid title is shown.*". "When the engagements or undertakings of the United States with respect to property exclusively their own, from a period anterior to the existence of the territorial government, shall have been consummated, when the subject and all control over it shall have passed from the United States and have become vested in a citizen or resident of the territory, then indeed the territorial regulations may operate upon it, but whilst these remain in the United States, *or are affected by their rights or powers or duties*, these rights, duties, or powers can in no wise be influenced by an inferior and subordinate authority." All the above principles had been fully declared in the case of Wilcox v. Jackson 13 Pet., arising upon the old Fort Dearborn reservation in Illinois, and are only more fully declared in Gibson v. Chouteau, 13 Wallace; because in this last case there was a more rebellious spirit manifested against the law as theretofore pronounced by the supreme court. That a confirmation (which was Jeanette's case before the General Term) by the old Board under the act of 1807, does not convey the fee of the United States, need hardly be urged. Under the act of 1805 a report of confirmations by commissioners was to be made subject to the action of Congress. By the act of 1807, a confirmation in its effect is declared by the 4th section to amount to this: "Which decision of the commissioners, when in favor of the claimant, shall be final against the United States, any act of Congress to the contrary notwithstanding." The finality of this decision is but a recognition of the incomplete or inchoate title under the prior government, to be perfected into a perfect title by patent through the modes prescribed by the 6th section of the act of 1807, through which a patent may be obtained. Burgess v. Gray, 16 How.

The great case of Wilcox v. Jackson, 13 Pet. was on appeal from the Supreme Court of Illinois. The most eminent lawyer in that state, Justin Butterfield, when the opinion below was delivered, remarked with biting irony: "There is but one thing wanting to render our judicial system perfect. The constitution should have provided an appeal from the supreme court to two justices of the peace." Whether the federal judiciary as speaking through Judge Fields would be imposed by an appeal to the St. Louis General Term, speaking through Judge Jones, may be a question upon which jurists may be divided; all will agree, however, that no such revisory jurisdiction exists at present in the General Term. A valuable lesson of submission to authority might have been gleaned from the case of Stephenson v. Smith, 7 Mo. 622, where Judge Scott uses this language: "How can an assumption of this

jurisdiction be deemed a violation of the compact, when in determining the controversies whose cognizance we have assumed, *we do not look to state laws or regulations* for our guide, but the laws of the United States *and to those principles of jurisprudence which would control the courts* of the United States, if they had jurisdiction. We are, in fact, discharging a portion of the functions appertaining to the general government, instead of acting in hostility to *its policy* and laws, *we are humbly endeavoring to carry them into effect, in the spirit in which they were ordained.*" The General Term, in speaking of Gibson v. Chouteau, says: "To that unfornate case we may ascribe the unsettled condition of the titles to large tracts of land in this city and county, of vast value." This is the language of an elective judiciary, so in contrast with a late declaration of the Supreme Court of the United States, that I place them in juxtaposition. At the present term in United States v. Pacific R. R. (2 CENT. L. J. 831), Judge Davis rendering the opinion of the court, uses these words.: "We can not go into an argument of the *consequences* which follow our decision; consequences are not an element to be considered in the determination of the question, whether an act of incorpration is less beneficial to the government than it supposed; and whether an act of Congress be more or less politic and wise, it is not our province to determine; when we have declared the meaning of it, if there be power to pass it, our duty in connection with it is ended." The sooner these sublime teachings of Judge Scott and Judge Davis are recognized and acted upon by the local courts, the sooner will land litigation end.

But this struggle of the local courts to pervert the meaning or to defeat the results of a well matured decision of the Supreme Court of the United States will end in disaster to the former. Judicial vagaries are no part the capital stock of the Supreme Court of the United States, when called upon to put a "*bona fide* purchaser" from the United States into the possession and enjoyment of that property which has been sold to him by the sovereign authority of the nation. To resist the inevitable is to gnaw a file. M.

Effect of Acceptance of Forged Commercial Paper—Status of the United States with Reference to Commercial Transactions.

JAY COOKE *ET AL* v. THE UNITED STATES.

Supreme Court of the United States, October Term, 1875.

1. Liability of the United States on Account of the Reception by an Assistant Treasurer of Forged Treasury Notes.—Certain treasury notes, either forged or surreptitiously put in circulation, purporting to have been issued under the act of March 3, 1865 (13 Stat. 468), were delivered by Jay Cooke & Co. to the assistant treasurer at New York under the act of August 12, 1866 (14 Stat. 31) for redemption, and were by him paid for. These notes were so delivered on various days between September 20 and October 8, and were, by the assistant treasurer transmitted to the treasurer at Washington. They were there discovered to be counterfeit, and were all returned to New York, October 12, and on the following day, Jay Cooke & Co, were notified. *Held*, that as the notes were not made payable at any particular place, they were payable at the treasury at Washington; that the duty of the assistant treasurer was simply to receive and transmit to the "Treasury Department," and pay the amount due upon the draft of the treasurer; that as the transaction required the action of the "Treasury Department" at Washington before it was complete and before the notes could be said to be "retired," this department was entitled to a reasonable time to make the necessary examination, comparison of numbers, etc., before the government would be concluded by the fact that the notes had been received by him; that the time consumed in this case was not unreasonable; and consequently, that if the notes were in fact *counterfeit*, the government could recover back the money paid for them; otherwise if they were notes printed from the genuine plates and surreptitiously put in circulation. [Miller, J., not sitting; Clifford, J., dissenting.]

2. Liability of the United States on Account of Genuine Treasury Notes Surreptitiously put in Circulation.—If genuine treasury notes are surreptitiously put in circulation, the United States will be liable for their payment, at maturity, to a *bona fide* holder; and so likewise when presented by such a holder for redemption before maturity, under the act of April 12, 1866. [Miller, J., not sitting; Clifford, J., dissenting.]

Argument 1. When the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances. [Acc. U. S. v. Bank of Metropolis, 15 Pet. 377; Floyd's Acceptances, 7 Wall. 557.]

Argument 2. As a general rule, one who accepts forged paper purporting to be his own, and pays it to a holder for value, can not recall the payment. He must repudiate as soon as he *ought* to have discovered the forgery; otherwise he will be bound. [Acc. Gloucester Bank v. Salem Bank, 17 Mass. 45.]

Argument 3. But where from the nature of the transaction the party receiving is entitled to something more than a mere inspection of the paper, as for instance, an examination of accounts he can not, be charged with the loss consequent upon the adoption of such forged paper, until such examination ought to have been completed.

Argument 4. What is a reasonable time within which such forged paper must be returned in order to relieve the party receiving it from the consequent loss, is, where the facts are undisputed, a question for the court.

Argument 5. If the paper is received and paid for by an agent, the principal is not charged unless the agent had authority to act for him in passing upon the character of the instrument.

In error to the Circuit Court of the United States for the Southern District of New York.

Mr. Chief Justice WAITE delivered the opinion of the court.

The United States sued Jay Cooke & Co., in this action, to recover back money paid them by the assistant treasurer, in New York, for the purchase or redemption before maturity, under the act of August 12, 1866, (14 Stat., 31,) of what purported to be eighteen 7-30 treasury notes, issued under the authority of the act of March 3, 1865, (13 Stat., 468,) but which it is alleged were counterfeit. Cooke & Co. insist that if they honestly believed the notes in question were genuine, and so believing in good faith passed them to the assistant treasurer, and he, under a like belief and with like good faith received and paid for them, there can be no recovery even though they may have been counterfeit.

As this defence meets us at the threshold of the case, it is proper that it should be first considered.

It was conceded in the argument that when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the decisions of this court. Floyd's Acceptances, 7 Wall., 557; U. S. v. Bk. of Metropolis, 15 Pet., 377. As was well said in the last case: "From the daily and unavoidable use of commercial paper by the United States, they are as much interested as the community at large can be, in maintaining these principles." It was also conceded that genuine treasury notes, like those now in question, were before their maturity part of the negotiable paper of the country. We so held, at the last term, in Vermilye & Co. v. Express Co., 21 Wall., 138.

It is, undoubtedly, also true as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly perhaps, the adoption of the paper as genuine by its apparent maker. Often the bare receipt of the paper accompanied by payment is equivalent to an adoption within the meaning of the rule, because, as every man is presumed to know his own signature and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made, is all that the law considers necessary for his protection. He must repudiate as soon as he *ought* to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable, and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. The rule is thus well stated in Gloucester Bank v. Salem Bank, 17 Mass., 45: "The party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his action."

When, therefore, a party is entitled to something more than a mere inspection of the paper before he can be required to pass finally upon its character, as, for example, an examination of accounts or records kept by him for the purposes of verification, negligence sufficient to charge him with a loss cannot he claimed until his examination ought to have been completed. If, in the ordinary course of business, this might have been done before payment, it ought to have been, and payment without will have the effect of an acceptance and adoption. But if the presentation is made at a time when, or at a place where such an examination cannot be had, time must be allowed for that purpose; and, if the money is then paid, the parties, the one in paying and the other in receiving payment, are to be understood as agreeing that a receipt and payment under such circumstances shall not amount to an adoption, but that further enquiry may be made, and if the paper is found to be counterfeit, it may be returned within a reasonable time. What is reasonable, must in every case depend upon circumstances; but until a reasonable time has in fact elapsed, the law will not impute negligence on account of delay.

So, too, if the paper is received and paid for by an agent, the principal is not charged unless the agent had authority to act for him in passing upon the character of the instrument. It is the negligence of the principal that binds, and that of the agent has no effect, except to the extent that it is chargeable to the principal.

Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion. U. S. v. Kilpatrick, 9 Wheat. 735; Gibbons v. U. S. 8 Wall. 269. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same dilligence to charge the drawers and endorsers that is required of individuals, and if it fails in this, its claim upon the parties is lost U. S. v. Barker, 12 Wheat. 559. And generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty and authorized to represent the government in that behalf, neglects that duty and loss ensues, the government must bear the consequences of his neglect. But this can not happen until the officer espcially charged with the duty, if there be one, has acted or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will, but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world.

Such being the principles of law applicable to this part of the case, we now proceed to examine the facts.

The department of the treasury is by law located at the seat of government as one of the executive departments, and the secretary of the treasury is its official head. Rev. Stat. sec. 233; 1 Stat. 65. All claims and demands against the government are to be settled and adjusted in this department, (Rev. Stat. sec. 236; 3 Stat. 366), and the treasurer of the United States is one of its officers. Rev. Stat. sec. 301; 1 Stat. 65. His duty is to receive and keep the money of the United States and disburse it upon warrants drawn by the secretary of the treasury, countersigned by either comptroller, and recorded by the register, and not otherwise. Rev. Stat. sec. 305; 1 Stat. 65. The rooms provided in the treasury building at the seat of government for the use of the treasury are by law the treasury of the United States. Rev. Stat. sec. 3591; 9 Stat. 59. Assistant treasurers are authorized and have been appointed to serve at New York and other cities. Rev. Stat. sec. 3595; 9 Stat. 60. The rooms assigned by law to be occupied by them are appropriated to their use and for the safe keeping of the public money deposited with them. Rev. Stat. sec. 3598; 9 Stat. 59. The assistant treasurers are to have the charge and care of the rooms, etc., assigned to them, and to perform the duties required of them relating to the receipt, safe-keeping, and disbursement of the public money. Rev. Stat. sec. 3599; 9 Stat. 59. All collectors and receivers of public money of every description within the city of New York are required, as often as may be directed by the secretary of the treasury, to pay over to the assistant treasurer in that city all public money collected by them or in their hands. Rev. Stat. sec. 3615; 9 Stat. 61. The treasurer of the United States, and all assistant treasurers, are required to keep all public money placed in their possession till the same is ordered by the proper department or officer of the government to be transferred or paid out, and, when such orders are received faithfully and promptly to comply with the same, and to perform all other duties as fiscal agents of the government that may be imposed by any law or by any regulation of the treasury department made in conformity to law. Rev. Stat., sec. 3639; 9 Stat., 60. All money paid into the treasury of the United States is subject to the draft of the treasurer, and, for the purpose of payment on the public account, the treasurer is authorized to draw on any of the depositaries as he may think most conducive to the public interest and the convenience of the public creditors. Rev. Stat. sec. 3644; 9 Stat. 61.

Thus it is seen that all claims against the United States are to be settled and adjusted "in the treasury department," and that is located "at the seat of government." The assistant treasurer in New York is a custodian of the public money, which he may pay out or transfer upon the order of the proper department or officer, but he has no authority to settle and adjust, that is to say, to determine upon the validity of any claim against the government. He can pay only after the adjustment has been made "in the treasury department," and then upon the drafts drawn for that purpose by the treasurer.

By the act of April 12, 1866, the secretary of the treasury was authorized, at his discretion, to receive the treasury notes issued under any act of Congress in exchange for certain bonds, or he might sell the bonds and use the proceeds to retire the notes. 14 Stat. 31. This exchange or retirement of the notes involved an adjustment of the claims made on their account against the government. That adjustment, as has been seen, could only be had in the treasury department, and the government can not be bound by any payment made without it, through one of the assistant treasurers, until a sufficient time has elapsed, in the regular course of business, for the transmission of the notes to the department and an examination and verification there.

That such was the expectation of Congress is apparent from the legislation authorizing the issue of such notes. On the 23rd of December, 1857, and act was passed "to authorize the issue of treasury notes." 11 Stat. 257. The payment or redemption of these notes was to be made to the lawful holders upon presentment at the treasury. Sec. 2. The notes were to be prepared under the direction of the secretary of the treasury, and to be signed in behalf of the United States by the treasurer thereof, and countersigned by the register of the treasury. Each of these officers was to keep, in books provided for that purpose, accurate accounts, showing the number, date, amount, etc., of each note signed or countersigned by himself, and also showing the notes received and cancelled. These accounts were to be carefully preserved in the treasury. Sec. 3. The notes were made receivable for public dues. Sec. 6. The officer receiving the same was required to take from the holder a receipt upon the back of each note, stating distinctly the date of payment and amount allowed. He was also required to make regular and specific entries of all notes received by him, showing the person from whom received, the number, date, and amount of principal and interest allowed on each note. These entries were to be delivered to the treasurer with the notes, and if found correct he was to receive credit for the amount allowed. Sec. 7. To promote the public convenience and security, and protect the United States, as well as individuals, from fraud and loss, the secretary of the treasury was authorized to make and issue such instructions as he should deem best, to the officers required to receive the notes in behalf of, and as agents in any capacity for, the United States as to the custody, disposal, cancelling, and return of the notes received, and as to the accounts and returns to be made to the treasury department of such receipts. Sec. 8. The secretary of the treasury was directed to cause such notes to be paid when they fell due, and he was authorized to purchase them at par for the amount of the principal and interest due at the time of the purchase. Sec. 9.

The act of July 17, 1861, "to authorize a national loan, and for other purposes," provided for an issue of 7-30 treasury notes, and, in terms, re-enacted all the provisions of the act of December 23, 1857, so far as the same were applicable and not inconsistent with what was then enacted. 12 Stat. 259, secs. 1 and 10.

The acts of June 30, 1864 (13 Stat. 218), and March 3, 1865, (13 Stat. 468), which authorized further issues of the same class of notes, did not in terms re-enact the provisions of the acts of 1857 and 1861, but they did authorize and require the secretary to make and issue such instructions to the officers who might receive the notes in behalf of the United States, as he should deem best calculated "to promote the public convenience and security, and to protect the United States, as well as individuals, from fraud and loss." 13 Stat. 221, sec. 8.

These are public laws of which all must take notice. In the absence of any evidence showing a regulation permitting an exchange or redemption of notes at any other place than the treasury, and after settlement and adjustment in the department, it will not be presumed that one was made. The notes in question are not made payable at any particular place. Consequently they are in law payable at the treasury, and this is at the seat of government and in the treasury department. In this department the secretary represents the government. His acts and his omissions, within the line of his official duties, are the acts or omissions of the government itself, and in all commercial transactions his official negligence will be deemed to be the negligence of the government. He is specially charged with the duty of retiring these treasury notes by exchange, payment, or purchase, and he is the only

agent authorized to act for the government in that behalf. All who deal with the government in respect to these notes are presumed to know his exclusive authority, for it is public law. Until such time, therefore, as he has acted, or in due course of business ought to have acted, there can have been no such laches as will charge the government. He is presumed to act officially only in his department. His attention can only be demanded after the presentation of the notes at that place. It was there that the accounts and records of the issues and redemptions under the early laws were by statute required to be kept, and that is the appropriate place for keeping such similar records as the secretary of the treasury may by regulation prescribe, under the later laws, to protect against fraud and loss.

Such seems to have been the understanding of the parties in the transaction which is now under consideration. The notes were "sold" to the assistant treasurer, and were, by stamp upon their back at the appropriate place for their endorsement, made payable "to the order of the secretary of the treasury, for redemption." The payment by the assistant treasurer under such circumstances, for the purchase, did not "retire" the notes. That upon the face of the transaction required the further order of the secretary of the treasury. Undoubtedly it was expected that in due course of business that order would be given, but, until given, or at least until it ought to have been given, it can not be said that the government has accepted the notes and adopted them as genuine.

Neither has there been such delay in returning the notes to Cooke & Co., after their receipt by the assistant treasurer, as will throw the burden of the loss upon the government. The return should have been made within a reasonable time, and what is a reasonable time is always a question for the courts when the facts are not disputed. Wiggins v. Burkham, 10 Wall. 133. Here there is no dispute. The notes were delivered to the assistant treasurer on different days between September 20 and October 8. The first suspicion in Washington in regard to their character, was October 5, when a note was found of which, upon inspection of the record, a duplicate was already in. All the notes were found and returned to New York October 12, and the next day Cooke & Co. were notified.

The amount of 7-30 notes issued by the government, was many hundreds of millions of dollars. Necessarily the accounts and records of their issue and redemption were voluminous. Between September 20 and October 8, Cooke & Co. themselves sold to the assistant treasurer for redemption more than $7,500,000. Other parties were at the same time making sales to large amounts. Time must be given for careful examination and scrutiny, and we do not think that, under all the circumstances, any unreasonable delay occurred either in their transmission to or return from the treasury department.

We are all clearly of the opinion, therefore, that if the notes were in fact counterfeit, their receipt by the assistant treasurer, and his payment therefor, did not preclude the United States from recovering back the money paid. So far there was no error in the courts below.

It was, however, contended by Cooke & Co., that if the notes were not counterfeit, but genuine notes lawfully and surreptitiously put in circulation, the government was bound for their payment to a *bona fide* holder, and consequently that there could be no recovery. We quite agree with the lamented judge of the circuit court who had this case before him upon error to the district court, that the evidence tending to show a fraudulent or surreptitious issue of notes printed from the genuine plates, was exceedingly meagre, and by no means sufficient to warrant a verdict to that effect; but the jury was not permitted to pass upon that question, as the district judge charged "that if the notes were printed in the department, and all ready for issue, yet if they were not in fact issued, the United States could recover." "The issue to bind the government," said the judge, "must be a physical act of an authorized officer."

It was conceded on behalf of the government, in the argument here, that if the notes had been due when they were received and paid, this part of the charge could not be sustained. We need not, therefore, examine that question. The notes were perfect and complete as soon as printed. They did not require the signature of any officer. As soon as they had received the impression of all the plates and dies necessary to perfect their form they were ready for circulation and use. In this respect they did not differ from the coins of the mint when fully stamped and prepared for issue. Coin is the money of commerce and circulates from hand to hand as such. These notes represent the promises of the government to pay money, and were intended to circulate and take the place of money, to some extent, for commercial purposes. Although not made legal tender as between individuals, they were, for their then face value, exclusive of interest, as between the government and its creditors. 13 Stat. 221, sec. 8. They were issued under the authority of "an act to provide ways and means for the support of the government" (13 Stat. 218, title) in its great peril, and they bore the "imprint of the seal of the treasury department as further evidence of lawful issue." Ib. 220, sec. 6. Their aggregate amount was very large, and they were of all convenient denominations, not less than ten dollars. Ib. 218, sec. 2. The people were appealed to, through their patriotism, to accept and give them circulation. They entered largely, and at once, into the commerce of the country and passed readily from hand to hand as, or in lieu of, money. After the close of the war they became, in a sense, too valuable for circulation, and were, on that account, to a large extent, withdrawn and held for investment.

But it is insisted, on the part of the government, that as the act of April 12, 1866, only authorized the secretary of the treasury to retire, before their maturity, notes "issued" under the authority of some act of Congress, he could only take up such as were actually put out by the "physical act" of some authorized officer of the government in pursuance of law. This, we think, is too narrow a construction of the act. At the time it was passed, the war of the rebellion was over. In the prosecution of this war an immense debt had been contracted. To meet the pressing demands upon the credit of the government various forms of securities had been put forth, some of which, like those now under consideration, would mature at an early date, and sooner perhaps than they could be met without the negotiation of new loans. In view of this possible contingency, Congress seems to have been desirous of meeting its obligation of this class whenever they could be exchanged for or retired with the proceeds of the sale of certain specified bonds having a longer time to run. The object evidently was to get rid of this species of debt, and we think the act may be fairly construed to authorize the retirement of all notes of this class outstanding which the government would be required to meet at maturity.

This leads to a reversal of the judgment. There have been other errors assigned upon the rulings made in the progress of the trial as to the admission of evidence. These need not be specially alluded to. It is sufficient to say that we think there is no error. The same may be said as to the ruling of the court upon the punching or cancellation of the notes. If they were counterfeit, the cancellation could do no harm, for they were worthless before. If they were genuine, they had already been canceled by the payment.

The judgment of the circuit court is reversed and the cause remanded with instructions to reverse the judgment of the district court and to award a *venire de novo*.

(Mr. Justice Miller did not sit on the argument of this cause and took no part in the decision.)

Mr. Justice CLIFFORD, dissenting:

I dissent from the opinion of the court in this case.

1. Because I am of the opinion that the United States are not liable for forged paper under any circumstances.

2. Because I am of the opinion that the United States are not liable for its paper promises fraudulently or surreptiously put into circulation, nor even if the fraudulent act was perpetrated by treasury officials.

Mr. Justice Field and Mr. Justice Bradley also dissent, and concur in this dissent.

—A CALL has been made for reform in the United States bankruptcy laws. No doubt some things could be improved, as, for instance, the provisions relating to compositions with creditors, concerning which there is now but one rule. The defects are said to be not in the laws but in the procedure.

—MISS GOODELL has applied to the Supreme Court of Wisconsin for license to practice in the courts of that state. She has sustained her petition with a long and able argument, which speaks as much for her ability as for her right. The statute of the state permits "any person" of certain acquirments to be licensed, and the young lady rightly thinks, that, if Iowa can admit women under the phrase, "any white male person," Wisconsin may be equally generous where the obnoxious "male" is not "nominated in the bond." Let us hope her courage may be duly rewarded.

Power of Court of Equity to order a Re-Docketing of a Cause, which has Disappeared from the Docket through Fraud.

DOSS v. DAVIS *ET AL.**

Supreme Court of Missouri, May Term, 1875.

Hon. DAVID WAGNER,
" W. B. NAPTON,
" H. M. VORIES,
" T. A. SHERWOOD,
" WARWICK HOUGH, } Judges.

Bill in Equity to re-docket Case on the Ground of Fraudulent Defence, and Removal of Cause from Docket.—Where it appears that through the fraud and combination of the attorneys, a false and sham defence to plaintiff's suit is interposed, and the court is so practised upon and deceived that no judgment is obtained, and without any order or action of the court, the case is suffered to disappear from the docket, plaintiff will be entitled, on a proper case presented, to have the cause re-docketed and a trial instituted on the pleadings as they remain on the files of the court.

Error to Buchanan Circuit Court.

Murat Masterson, for plaintiff in error.

Courts of equity have original, independent and inherent jurisdiction in cases like the one at bar. Sto. Eq. Jur. 252, and cases cited, Id. 256; Kerr on Fraud & Mist. 43, 44, and cases cited, 252, 293–4; Reigal v. Wood, 1 Johns. Ch. 401; Barnsly v. Powell, 1 Ves. 120, 284, 289; Phalen v. Clark, 19 Conn. 421; White v. Hall, 12 Ves. 324; Wilson v. Watt, 9 Md. 359; 2 Smith, L. C. 687; Browwood v. Edward, 2 Ves. 246; Bridgeman v. Green, Id. 627; Hugeniere v. Rasely, 14 Ves. 289; Phelps v. Peabody, 7 Cak 52; Robb v. Robb, 6 Cal. 22; Luttrel v. Lord Waltham, 4 Ves. 290; S. C. 11 Ves. 638; Goss v. Tracy, 1 Wil. 288; Thynn v. Thynn, 1 Vern. 296; Chamberlain v. Agar, 2 Ves. & B. 259. And plaintiff is entitled to have her case re-docketed, and set down on hearing. Defendants ought not to have the advantage they claim under the judgment.

Hall & Merryman, for defendants in error.

I. The petition does not state any cause of action. Plaintiff can sue Davis at any time on the note described in her petition. The dismissal of the suit as to Davis, as stated in the petition, is no bar to another suit.

II. The statute of limitations must be pleaded in actions at law; and, if pleaded to the new action which plaintiff may bring on said note, she could reply the facts set up in the petition in this case; and if they constitute a good reply, full effect would be given to them. 19 Mo. 64, 65.

III. If this suit can be maintained, a similar suit could be maintained in all cases of non-suit upon the allegations of fraud in obtaining said non-suit. This would be a novel practice.

WAGNER, Judge, delivered the opinion of the court.

This was a petition in the nature of a bill in equity. In substance it charges that in 1861, the plaintiff placed in the hands of Ebenezer N. O. Clough, an attorney-at-law, a promissory note against Davis and Arnold for collection; that Clough instituted suit thereon, in the Platte county Circuit Court, and that personal service was had on both of the defendants: that Arnold was entirely insolvent at the time and has remained so ever since, and that Davis was then and is now solvent and possessed of a large amount of real and personal property; that Arnold made no appearance, and judgment was rendered against him by default.

The petition then alleges that plaintiff's attorney, Ebenezer N. O. Clough, and defendants' attorney, W. McN. Clough, were brothers, and that they and the defendant Davis entered into a conspiracy and combination to defraud and cheat plaintiff, and in execution of this design it was agreed that defendant, Davis, should put in his separate answer, denying the allegations in the petition, and that the trial, as to him, should be a sham; that the answer was false in every particular, and known so to be by her attorney Davis and who filed it; that by the conspiracy entered into between the parties, the court was imposed upon in rendering its orders and judgment, and the plaintiff was defrauded out of her rights, and prevented from getting a judgment against Davis, who was the only solvent party defendant; that after the judgment was taken against Arnold, nothing further was done with the case, but it was permitted to be dropped from the docket; that plaintiff was a resident of the state of Kentucky, and that she was kept in ignorance of the true state of the case by the false and fraudulent representations of her attorney, and that immediately she became possessed of the facts, she took steps as soon as she conveniently could, to set aside the fraudulent proceedings.

The prayer was that the judgment against Arnold might be set aside, and the cause re-docketed, and a trial had against Davis on the merits.

To this petition Davis filed his answer, and the plaintiff replied.

In the court below, the defendant, Davis, moved for judgment in his favor on the pleadings, because the petition stated that in the year 1864, the case was tried in the Platte county Circuit Court, and that the court found for plaintiff as against Arnold, and rendered judgment against him; that the plaintiff in this suit, upon a petition in the nature of a bill of review, asked for a new trial as to the defendant, Davis, when no judgment had ever been rendered against him; he therefore asked the court to dismiss the plaintiff's petition because there was no judgment to review.

The court sustained this motion, and the plaintiff prosecuted her writ of error.

The motion of the defendant was based on a wrong theory—a mistaken assumption of facts. The petition is not in the nature of a bill of review, nor does it seek to review any judgment rendered against Davis the defendant. It proceeds directly upon the opposite view, that through the alleged fraud, connivance and conspiracy of the parties, no judgment at all was rendered.

As to the prayer, that the judgment against Arnold be set aside, that may be disregarded, so far as Davis is concerned. The judgment was properly taken against him, as he made no defense, but it was improperly made final, in consequence of the fraud of Davis and the attorneys. It may be set aside and the trial continued as if it had never been taken.

Courts of equity have full power to relieve against fraudulent acts which have prevented those things from being done which would have legally and justly been done, but for the false and fraudulent statements which induced the prevention.

Where there has been a fraudulent prevention or suppression, the court will take from the party himself, the benefit which he may have derived from his own fraud, imposition or undue influence, and restore the injured party to the position he was in, if possible, when he was displaced by the fraud. 1 Sto. Eq. Jur. § 256.

In the present case there was no adjudication against the defendant. It is charged that a false answer was put in, that the court was imposed on and deceived, and without any order, action or judgment, the case in some mysterious manner disappeared from the docket. If the plaintiff should prove her allegations, and it should be made to appear that this result was produced by the fraud, combination and conspiracy of Davis and the attorneys, she would be entitled to have the case re-docketed, and to have a trial on the pleadings as they remained on the file of the court.

The judgment will, therefore, be reversed and the cause remanded. The other judges concur.

*To appear in 60 Mo. This report is by the official reporter, Mr. Post.

Insurance—Payment of Premium and Delivery of Policy—Waiver of Defence and Estoppel from Denying Jurisdiction.

HOME INSURANCE COMPANY OF COLUMBUS, OHIO v. LORENZO B. CURTIS.*

Supreme Court of Michigan, October Term, 1875.

Hon. BENJ. F. GRAVES, Chief Justice.
" THOS. M. COOLEY,
" JAS. V. CAMPBELL, } Associate Justices.
" ISAAC MARSTON,

1. Pleading—Notice of Specific Defence under General Issue—Waiver of Defence by Omission to give Notice of it.—Where in a suit on an insurance policy, the company, while pleading the general issue, relies on a failure to make good a representation, etc., not contained in the policy, but set forth in some other instrument in the insurers' hands, the notice attached to the plea must, in Michigan practice, declare the instrument and indicate the breach. The defence is one that can be waived, and omission to give the notice implies a waiver of it. And this must be done whether, evidence showing such breach is incidentally given by the opposite side or not. [Circuit Court Rule 10.]

*Reported for this journal by Henry A. Chaney, Esq., of Detroit, Mich.

2. Insurance—Payment of Premiums.—If insurance agents advance to the company the money for a premium and take the note of the insured for the amount, and negotiate it, the condition of the policy that the premium shall be actually paid before the company becomes liable, is sufficiently complied with, and the company can not cancel the policy without notifying the assured and refunding or offering to refund the unearned premium.

3. ——. Delivery of Policy.—It is sufficient delivery of an insurance policy to leave it in the hands of the agents of the company, if they are willing to retain it, subject to the order of a third person, even though he does not call for it.

4. Practice—Abandonment of right to Removal of cause estops from questioning Jurisdiction.—One can not go to trial on the merits, voluntarily take his chances of the result, and then question the jurisdiction. The previous filing of a bond and petition for the removal of the case, without taking any further step, will not avail against such a manifest abandonment of the right to a removal.

Opinion of the Court by MARSTON J.

This was an action of assumpsit brought to recover upon a policy of insurance issued to Aaron Linton and made payable in case of loss to defendant in error as his interest in the property insured as mortgagee thereof, should appear. Defendant pleaded the general issue.

It appeared on the trial that Linton made a written application to the company for this insurance, in which he stated, in answer to a special question, that the property sought to be insured was mortgaged to the amount of five thousand dollars. This application was made a condition of the insurance, and a warranty upon tbe part of the assured that the facts therein stated were true. It also appeared that at the time this application was made and the policy issued, the property insured was mortgaged for a much larger amount.

The court was asked to charge the jury that under this state of facts the plaintiff could not recover. The request was refused and plaintiff in error excepted.

Under the issue in this case such a defence was not admissible. Circuit Court Rule 104 provides that in case the company shall rely, in whole or in part, upon the failure of the plaintiff to perform or make good any promise, representation or warranty, not contained in the policy but set forth in any other paper or instrument in the hands of the insured, the notice under the general issue shall declare the same and indicate the breach relied on. No notice of any such defence was given in this case. But it was insisted that as the fact that the property was mortgaged for more than five thousand dollars appeared from the plaintiff's own showing, the defendant could therefore insist upon the breach of warranty as a defence under the plea of the general issue, although there was no notice attached thereto indicating such breach. This position, we think, is not correct. The defence was one which the company had a right to waive, and the fact that no notice of such a defence was attached to the general issue, would give counsel for plaintiff to understand that the company did not intend to rely upon any such breach and would be likely, therefore, to prevent the plaintiff's counsel from making such preparation upon that point as they otherwise might do. The mere fact that the whole or any portion of the evidence showing such breach was incidentally introduced by the plaintiff as a part of his case, would make no difference, as the case must be disposed of in accordance with the issue joined between the parties. This question was not in issue and the court therefore properly refused to charge as requested. Peoria Ins. Co. v. Perkins, 16 Mich., 380.

There was evidence introduced tending to show that at the time the insurance was effected it was understood that credit was to be given for the premium,—that the agents of the company afterwards paid the premium to the company, and received from Linton an endorsed note for the amount in payment thereof, which they had discounted,—and that this note was afterwards taken up and a new note given for the amount of the first, with interest added, and that this note matured and was paid, some days after the loss under the policy occurred. There was also evidence tending to prove that this policy previous to the loss had been cancelled by the agents of the company under instructions from the company, and the unearned premium credited to the assured upon the agent's books. There was also evidence tending to show that the assured had been notified of such cancellation, but he denied ever having received such notice.

The court charged the jury in substance that if the agents of the company, acting for themselves, advanced the money for the premium to the company, and afterwards took Linton's note for the amount thereof as their own, and negotiated the same, this was a sufficient compliance with the condition in the policy requiring the premium to be actually paid before the company should become liable; and the court also charged the jury that the company could not cancel the policy without notifying the assured and returning the unearned premium. We find no error in either of these charges. If the company actually received the premium, it was a matter of no sort of consequence who paid it, and they could not afterwards cancel the policy without notifying the assured, and refunding, or offering to refund the unearned premium.

There was also evidence tending to show that it was agreed between Linton and the agents that the latter should retain this policy until Mr. Curtis, the mortgagee, should call for it, and the court charged the jury that it the policy was held under such an arrangement for Mr. Curtis and subject to his order, this constituted a sufficient delivery of the policy.

An actual manual delivery of the policy was not necessary. There is no objection to the assured leaving the policy in the hands of the agents of the company, subject to the order and control of a third person. If the agents agree to retain it under such circumstances, we can see no objection, and so far as a delivery is essential to the validity of the policy, this must be considered as sufficient, although such third party has not actually called for, or received it.

The only other objection urged in this case, is that the company filed a petition and bond in the circuit court for the purpose of removing this case to the United States court. These papers were filed in the circuit court, December 20th, 1873. It does not appear from the record that any farther or other steps were taken for the purpose of removing the cause,—no motion was entered or made, the attention of the court does not seem to have in any way been called to this fact, and the parties afterward, November 25th, 1874, proceeded to trial upon the merits, without objection or without questioning the jurisdiction of the court in any way. Whatever rights the company may have had upon filing this bond or petition, it could waive, and it certainly, under the circumstances in this case, must be considered as having waived them. The company could not go to trial upon the merits, take its chances upon the results, and afterwards question the jurisdiction of the court. Had the attention of the court been called to the fact that a proper petition and bond had been filed, and the court had nevertheless ordered the trial to proceed, there would then have been no reason for saying that the company had abandoned any of its rights.

As we find no error in the record, the judgment must be affirmed with costs.

Patent Right Notes—The Rule in Shirts v. Overjohn.

FREDERICK v. CLEMENS.*

Supreme Court of Missouri, May Term, 1875.

Present Hon. DAVID WAGNER, " WM. B. NAPTON, " T. A. SHERWOOD, " WARWICK HOUGH, } Judges.

Note signed under Mistake as to its Character—Negligence of Maker—Fraudulent Representations made to—What Question for Jury.—Where one voluntarily signs a promissory note, supposing it to be an obligation of a different character, but has full means of information in the premises, and neglects to avail himself thereof, relying on the representations of another, he can not set up such ignorance and mistake, as a defence against an innocent holder for value before maturity. Shirts v. Overjohn, 60 Mo. 305 (2 CENT. L. J. 423) affirmed. If, however, his signature is procured without negligence on his part, and through artifice or fraudulent representation, the rule is different, and the jury should be left, under appropriate instructions, to determine these facts.

Error to Linn Common Pleas.

A. W. Mullins, for plaintiff in error, cited in argument, Greer v. Yosti, 56 Mo., 307; Hamilton v. Marks, 52 Mo., 78; Horton v. Bayne, 52 Mo., 531; Corby v. Butler 55 Mo., 398.

S. P. Houston, for defendeant in error, cited Briggs v. Ewart, 51 Mo., 254; Martin v. Smylee 55 Mo., 577; Corby Ex'r v. Weddle, 57 Mo., 452.

HOUGH, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note, for the sum of $300, brought by the plaintiff, as endorsee for value before maturity, against the defendant as maker.

The defendant, in his answer, admitted the execution of the note and its assignment to the plaintiff, but alleged that said note was without consideration, and that his

*To appear in 60 Mo. This report is by the official reporter, Hon. Truman A. Post.

signature thereto was obtained by imposition and fraud; that, being unable to read or write more than his own name, the payee in said note falsely represented to him, when said note was presented to him for his signature, that it was simply a receipt for certain plows, which said payee had agreed to deliver to him. The answer further stated that the plows were never delivered, and that plaintiff had knowledge of all such facts before the assignment to him of said note.

Plaintiff replied, denying all the matters set up by the defendant in avoidance of his liability; and averred that he was a purchaser of said note in good faith, before maturity, and without notice of any equities between the original parties thereto, or of any defect in the title of the payee.

At the trial, the defendant testified, in effect, that, at the time he gave the note sued on, he entered into an agreement with one England, the payee in said note, to pay him, for the right to sell a certain gang-plow in three townships in Linn county, whatever should be received by him on the sale of said plows in excess of a specified sum, and in order "to secure England in this, gave him the note sued on, believing at the time it was a contract." He did not then examine the note. He could not read well, and he could write but little, and did not have his spectacles with him, without which he could not read at all. England wrote that part of the contract which was not printed, and read it all to him, and he understood it to be simply a contract to secure to England his portion of the proceeds of the sale of the plows; and if he had known it was a note he would not have signed it.

On cross-examination, defendant stated that England read over the instrument to him which he was asked to sign, and "it read $300 payable in twelve months." He further stated that he told plaintiff, who called on him with the note in his possession, after the assignment and a short time before it became due, that he made the note, but that he got nothing for it. When re-examined, he said that he told plaintiff that he would not pay it, that he got nothing for it, and that he did not sign it as a note. The foregoing is the substance of the defendant's account of the circumstances under which he signed the note, and of the obligation he intended to incur. There was other testimony, but it will not be necessary to notice it.

The court gave, at the instance of the defendant, the following instruction: "If the jury believe from the evidence, that Clemens, when he signed the note sued on, did not understand its character, but thought he was signing a contract to account to England for the proceeds of plows, for the sale of which he was to act as agent, then they are bound to find for the defendant;" to the giving of which plaintiff excepted.

Exceptions were also saved to the giving of two instructions, asked by the defendant, on the subject of notice, and to the refusal of one asked by the plaintiff on the same subject. These instructions, as the case is now presented, need not be considered.

There was a verdict and judgment for the defendant, and the plaintiff has brought the case here by writ of error.

The precise question presented by the instruction above set forth, was passed upon in the case of Shirts v. Overjohn, decided at the present term; and it is unnecessary to repeat here the views there expressed. The instruction under consideration is at variance with the rule laid down in that case, and must, therefore, be held to be erroneous.

In this case, however, it should have been left to the jury to say, on this issue, under proper instructions, whether the defendant, without negligence on his part, signed the note sued on, in ignorance of its true character, through any artifice or fraudulent representations on the part of England.

The judgment will be reversed and the cause remanded; all the judges concur, except Judge Vories, who is absent.

Appellate Procedure.

EX PARTE FRENCH.

Supreme Court of the United States, October Term, 1875.

Judgment on Facts found by the Inferior Court and Mandate to "proceed in Conformity with this Opinion."—In a case submitted to the judge of the court below at the trial, without a jury, the supreme court, upon consideration of the facts found, reversed the judgment and remanded the cause "with instructions to proceed in conformity with this opinion;" but an application for a mandamus to compel the circuit court to enter judgment in favor of the plaintiff is refused.

Petition for mandamus.

Mr. Chief Justice WAITE delivered the opinion of the court.

French sued Edwards and others to recover the possession of certain lands, alleging that he was the owner in fee, and that the defendants unlawfully withheld the possession from him.

The defendants answered, setting up several defences, and, among others the following:

1. Want of title in the plaintiff.
2. Statutes of limitations.
3. In some instances title in themselves.

The case was submitted to the court without a jury, and upon the trial there was a special finding of facts, to the effect that the defendants were in the adverse possession of the property; that the plaintiff once held the title, but that, on the 9th day of January, 1863, and before the commencement of the suit, he had executed a certain instrument of writing, a copy of which was given.

Upon these facts the court found, as a matter of law, that the legal title passed out of the plaintiff by the operation of the instrument set forth, and did not revert on the failure of the conditions it contained, but still remained and was vested in the grantees. Judgment was given in favor of the defendants upon this finding. The case was then brought here and error assigned upon this ruling. At the last term we decided that upon the facts found, the court should have presumed that the grantees in the instrument of January 9, had reconveyed, thus reinvesting the title in the plaintiff, and adjudged accordingly. The judgment was for this reason reversed, and the case remanded, "with instructions to proceed in conformity with this opinion." See the case reported, 21 Wall. 147.

Upon the filing of the mandate in the court below, the case was set down for a new trial. French now moves here for a mandamus, directing the circuit court to enter judgment in his favor for the recovery of the lands upon the facts found.

The finding brought here for review was special and met only a part of the issues. If the conclusion of law to which the court came was correct, the other issues were immaterial. The case was disposed of without reaching them. We have, however, determined that the facts found were not sufficient to justify the conclusion reached, and have ordered the court to proceed with the case, notwithstanding the finding. In effect we have decided that the court erred in not proceeding to try the other issues. Our action only precludes that court from adjudging in favor of the defendants upon the special facts found and sent here for our opinion. In all other respects it is at liberty to proceed in such manner as, according to its judgment, justice may require.

The petition for a mandamus is denied.

Book Notice.

GREEN'S BRICE'S ULTRA VIRES.—A Treatise on the Doctrine of *Ultra Vires;* being an Investigation into the Principles which limit the Capacities, Powers, and Liabilities of Corporations, and more especially of Joint Stock Companies. By SEWARD BRICE, M. A., LL. D., London, of the Inner Temple, Barrister at Law. With Notes and Reference to American Cases, by ASHBEL GREEN, of the New York Bar. New York: Baker, Voorhis & Co. 1875. For sale by Soule, Thomas & Wentworth, St. Louis.

The title of this work suggests sufficiently, perhaps, what is intended to be understood by the term *ultra vires* as applied to corporations. Dr. Brice informs us that the doctrine of *ultra vires* is of modern growth; that its appearance as a distinct fact, and as a guiding, or rather as a misleading principle in the legal system of England, dates from about the year 1845, the doctrine having been first prominently mentioned in Coleman v. Eastern Counties Railway Co., 10 Beav. 1, 16 L. J. Ch. 73, in 1846, and in the East Anglican Railway Co. v. Eastern Counties Railway Co., 11 C. B. 775, 21 L. J. C. P. 23, in 1851. Mr. Green, however, tells us, that the powers of private corporations, and the effect of going beyond them, received earlier consideration from the American courts than from those of England. The reason for this, he says, consists in the fact that, until a comparatively recent period, joint stock associations, consisting of individuals united under and governed by deeds of settlement or other articles of agreement, occupied, in England, the place corresponding to private corporations in this country. Accordingly, he continues, those curious to trace historically the doctrine treated of by Dr. Brice, will find that the American courts, both federal and state, years before the earliest English case cited in this treatise, discussed the power of trading corporations and laid down rules in regard thereto; and in proof of this he cites a number of cases, beginning with Head v. Providence Insurance Co., 2 Cranch, 127, decided in 1804. Mr. Green, however, quotes from Lord Kame's Principles of Equity, originally published in 1766 (3d ed., p. 309), some sentences in which the word *ultra vires* is used; but states that, to his knowledge, it appears first in the English Reports, as used by Baron Bramwell, when at the bar, in the case already quoted from 11 C.

B. 775. He also tells us that it does not appear in Angell & Ames on Corporations until the 5th edition, published in 1855. Nothing, perhaps, more suggestively illustrates the rapid growth of the law, than the appearance of an elaborate treatise under a title which, thirty years ago, was scarcely to be found in any law book in the English language.

The sudden growth of the doctrine of *ultra vires* in England, was due, as stated by Dr. Brice, to the mania for building railways which sprang up in that country as in this, about thirty years ago, and to the consequent creation of a vast number of railway corporations. These corporations were created by acts of parliament, the royal prerogative being inadequate to confer the extensive powers necessary to the accomplishment of the objects designed.

The doctrine of *ultra vires* seems, in the main, to resolve itself into the question, What acts of a corporation are valid as being within the powers conferred by its charter, and what are void as being in excess of these powers? "It is thus," (to quote from Dr Brice) "the creature purely of judicial decision. It was originated by the courts, *proprio motu* upon grounds of public policy and commercial necessity, and to meet and provide for circumstances which called for the intervention of some strong hand, but for which the state had not directly provided. Being so originated, and, as most will probably admit, wisely originated, and in the best interests of trade and commerce, it has, however, become a species of Frankenstein. The tribunals have created, but they have professed themselves powerless to curtail the operations of the principle which they have called into existence, or even to systemize its effects. In consequence, the doctrine of *ultra vires* is constantly springing up in unexpected quarters, and manifesting its effects in an unforeseen and unwelcome manner. One of the first onslaughts was upon the time honored maxim of the common law, that a man cannot stultify himself (Beverley's case, 4 Rep. 123 b)—that the lunatic, the fool, the drunkard and the knave, who have made a contract shall not subsequently repudiate the same, by alleging that neither they nor their agents had at the time sufficient brains or authorization to make it. This maxim the doctrine of *ultra vires* soon demolished, and corporations may set up their incapacity whenever it is inconvenient for them to carry out their engagements. (Belfour v. Ernest, 5 C. B. N. S., 601; 28 L. J. C. P., 170; London Dock Co. v. Sinnett, 8 E. & B., 347). It next ran full tilt against the less rigid, but more equitable principles laid down by the courts of Lincoln's Inn. 'Who seeks equity must do equity,' and 'Who comes for aid to chancery must come with clean hands,' are two of the most elementary principles of the chancellor's jurisdiction. But the new doctrine refused to allow them to be applied to corporations, and, after much wrangling, it came off victorious, and corporations can now be relieved from *ultra vires* contracts and keep the benefits thereof. Another rule was found to hamper the development of the doctrine, and to impose some check upon the license assumed by corporations in their dealings. '*Qui facit per alium facit per se*,' is the basis of the law of principal and agent, and it has hitherto been deemed a very useful and common sense rule, as sound and rational when applied to the complex transactions of trade and commerce, as to the ordinary intercourse of every day life. But the doctrine of *ultra vires* objected to its restraint, and made a desperate stand to be relieved from it. Here, however, the common law maintained its supremacy (Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259), though, *mirabile dictu*, equity yielded (Mixer's case, 4, D. & J. 575, 586), so that there is now to be seen the strange anomaly that corporations may be liable at law under circumstances where chancery imposes no liability, and that what the former says is palpable fraud, the latter will often pass over, or at least admit its inability to punish."

There is something about this pointed and vigorous language that we like, and it is so instructive that we are tempted to quote another paragraph of it. "Besides these anomalies," continues the learned author, "there is the uncertainty that shrouds the application of the doctrine. It is often impossible to predicate beforehand what transactions will be held within the powers of a given corporation. It is *ultra vires* of the Great Eastern Railway Company to run steam packets from Harwich (Colman v. Eastern Counties Railway Company, 10 Beavan, 1), but not of the South Wales Railway Company to run them from Milford Haven (South Wales Railway Co. v. Redmond, 10 C. B. N. S. 675.) It is *ultra vires* of a steamship company to sell the whole of its vessels except two (Gregory v. Patchett, 33 Beavan, 597), but perfectly legal thus to dispose at one swoop with the whole of them, (Wilson v. Miers, 10 C. B. N. S., 348). It is *ultra vires* of railway companes to enter into partnership (Charlton v. Newscastle & Carlisle Railway Co., 5 Jur. N. S., 1097), but not *ultra vires* to make arrangements for dividing the whole of the joint profits among themselves in fixed proportions (Hare v. London & N. W. Ry. Co., 2 J. & H. 80). It is *ultra vires* of the town of Southhampton, (Attorney-General v. Andrews, 2 Mac. & G. 225), or Sheffield (Reg v. Mayor L. R. 6 Q. B. 552), to incur expense in order to obtain a proper supply of water for their respectlve inhabitants, but not so for Ashton-under-Lyne (Bateman v. Mayor, 3 H. & N. 323), or Wigan (Attorney-Gen. v. Mayor, 5 D. G. M. & G. 52). As a necessary result the decisions and *dicta* upon this subject are very conflicting, and some absolutely irreconcilable; while the principle itself is become, if not an excrescence upon, at least a very disturbing element in the legal system. But it soon showed itself almost as inimical and dangerous a friend as unquestionably it was as an enemy. From being a protection to shareholders, by preventing their companies from embarking in hazardous enterprises, it has de vloped into their terror by putting on the list of contributories persons whose shares were surrendered or forfeited years before, but whose surrender or forfeiture was *ultra vires*. (Ten years afterwards in the steamship's case. 3 D. G. & Sm. 198.) Acquiescence and lapse of time will lay the ghost of most misdeeds, but they are unavailing where this doctrine is concerned, and *ultra vires* compromises *bona fide* made, have been opened after the lapse of well nigh a quarter of a century, in order to fix with liability the parties thereto (Spackman v. Evans, L. R. 3 H. Lds. 171)."

The rapid growth of this doctrine in England, and the unreasonable extent to which the courts of that country have pushed it, may have been due in some measure to a fact, recently disclosed by the English Law Journals, that most of the English judges are shareholders in railway corporations. We presume that the same is true of the wealthier members of the English bar. How a series of decisions on the law of corporations, built up by a bench and bar, strongly interested in favor of such bodies, ought to be followed in this country, is worthy of serious consideration. It seems certain that the rule which permits a corporation to repudiate its obligations because they are *ultra vires*, without first restoring the benefits received, has no foundation, either in the legal reason, in justice, or in public policy.

Such being the state of the law of this subject in England, the reader will not expect to find in Dr. Brice's work a very concise and systematic treatise. The learned author states, with commendable candor, that his work is an attempt, though perhaps nothing more, to collect and group the more important of these decisions. Where it has been found possible, the general conclusions, deducible from a series of authorities have been formulated in specific terms. The subject has been arranged under four main heads: 1. A brief introduction; 2. The effect of the doctrine upon what may be called the substantive law of corporations; 3. Its influence on the special powers which any particular corporation may possess; and, 4. The procedure relating to *ultra vires* proceedings, and the persons affected thereby. The author states that it has been his aim either to state the substance of, or at least refer to, all the chief cases, meaning British cases,—but confesses that omissions may nevertheless be noted; and well he might, for we find many such added by the American editor.

Mr. Green, in his introduction states that that which is most open to criticism in Dr. Brice's work is the repetition which occurs in dealing with the different phases of the doctrine of *ultra vires*, and the extent to which he has gone in considering the general law of corporations. Mr. Green wisely suggests that an error in these particulars is not so much to be deprecated as the contrary would have been. For, after all that can be said, the most essential requisite in a law book is that it shall be a good index to the law on the subject it purports to cover, as embodied in the statutes and judicial reports, and an index is fatally defective if it is incomplete. Nothing makes a practitioner feel so comfortable when he buys a new law book as to know that nothing has been omitted from it, and that the "law" on the subject embraced in it is all there.

Mr. Green states that the chief embarrassment under which he has labored has arisen from the excess of material that he had collected, and which he has endeavored to compress and curtail as far as practicable. As it is, the notes have exceeded the dimensions originally proposed, and the fear that the book would exceed the limits of a single volume, has induced him to omit a large amount of matter prepared mainly for the appendix. Notwithstanding this apology, the great diligence of Mr. Green has succeeded in packing into his notes more than two thousand cases. As respects the power of Municipal Corporations, Mr. Green states that he has not cited many adjudications, but has contented himself with referring to the valuable and widely known treatise of Judge Dillon on that subject.

We will here take the liberty of giving the enterprising publishers of this book a friendly nudge on one point. The type in which the text of this work, as well as other works published by the same house, is set, is unreasonably large, even for law books. It is, if we mistake not, what printers call *pica*; whereas the standard for books of this kind is *small pica*, the type on which the preface to this volume was printed. Two opposing forces have evidently been at work in the preparation of this edition: The publishers, bent upon stuffing, expanding and pouring water into it, by the employment of type, both for the text and notes, unreasonably large; and the American editor, exerting the powerful leverage of a disciplined and cultivated mind, in the process of reducing—compressing—squeezing the water out. By employing the usual type, about one hundred pages might have been gained without an increase of bulk; and we can not reflect without a twinge of regret upon the amount of useful matter a powerful squeezer like Mr. Green could, as engineers say, have rammed into them.

Our judgment upon this work, gathered in part from a hasty examination of it, and in part from consulting with those who have read the first edition, is that it is the work of an able lawyer who has thoroughly studied the subject under discussion; that its chief defect consists in "travelling out of the record," and lugging in matters relating to the law of corporations, but not strictly a part of the law of *ultra vires*, and that its other defects are mainly such as are inseparable from the confused state of the adjudications on the subject; that the work of the American editor is well and ably done, with exceptional fulness, and at the same time exhibiting an exceptional power of condensation. Nevertheless, it has the defect of being an English book with American notes; whereas what is needed by the profession here is a distinctively American work on the subject—of course, not ignoring the English decisions. The doctrine originated in America fifty years before it was heard of in England, and the American decisions upon it greatly outnumber the English ones. An English work on such a subject with American notes—the cases cited in the latter, as in this case, greatly outnumbering those collected in the text—conveys to the mind a forcible suggestion of the vulgar

adage about the tail wagging the dog. It is nevertheless, as Mr. Green suggests, "the beginning of a needed work, which must be accomplished before this most important branch of the law of corporations is reduced from a chaos of discordant decisions to a branch of legal science with accurate and well established formulas. In the absence of such "needed work," we know that this will prove extremely useful to the profession, and we cordially recommend it to them. We ought not to omit to state that it has what appears to be a good index, compiled by Thomas Thacher, Esq.

Notes of Recent Cases.

Mechanics' Lien Law—Payments in Advance of Sums Due.—*Schneidhorst v. Luecking*; Supreme Court of Ohio. Opinion *per curiam*. A contractor, after entering on the performance of his contract, being unable for want of means to go on with the work, the owner, to enable him to do so, in consideration that he would not abandon the contract, in good faith made payments to the contractor faster than he was required to do so by the original contract for which he was to be allowed interest; and also, with the assent of the contractor, bound himself to other parties, in consideration that they would contribute labor or materials toward the completion of the work, that he would pay them therefor. *Held*:—That the money thus paid, and the liabilities thus assumed, were not payments in advance of sums due, within the meaning of section 6 of the mechanics' lien law.

Evidence—Market Reports by Telegraph—Contract to send the Same—Measure of Damages.—*Turner v. Hawkeye Tel. Co.*, Supreme Court of Iowa, Oct., 1875. Opinion by Beck J. [9 West. Jur. 654].* 1. Where a telegraph company is charged with sending a market report incorrectly, it will be presumed, in the absence of any evidence upon the subject, that the reports were correctly received by the comyany. 2. Where such a company undertakes, without restriction upon its liability, to transmit such reports, the burden rests upon it to show that a mistake in the transmission occurred for reasons which would relieve it of liability. 3. When such a company contracts to send market reports to be obtained by its agents, it undertakes to procure and send correct reports. 4. The finding of a referee of facts not supported by the evidence, will not operate to reverse the judgment rendered thereon, when other facts are found to be supported by the evidence which sufficiently supports the judgment. 5. Where a telegraph company, under a contract to furnish market reports, advised plaintiff that wheat was worth $1.21 1-2, whereupon plaintiff advised the purchase of 5,000 bushels, and his agents paid therefor $1.50, which was the actual price, the court allowed damages at the rate of 28 1-2 cents per bushel. *Held*, that the sum was not beyond the amount plaintiff was entitled to recover. 6. A telegraph company contracting to furnish Chicago market reports to a wheat buyer in Iowa, is liable for damages resulting from the purchase of wheat by the dealer, in Chicago, without notice that it was his intention to make such purchase.

Constitutional Law—Contracts. — *Council Bluffs v. Kansas City, etc., R. R. Co.*; Supreme Court of Iowa. Opinion by Miller, Ch. J. 1. Chapter 6, laws of 1872, entitled "an Act requiring specified Acts and Duties of Railroad Companies, and providing certain remedies for the enforcement of the same," being an act to compel all railroad companies whose roads terminate at or near the city of Council Bluffs, and making connection with that of the Union Pacific Railroad Company, to make all transfers of freight, passengers and express matter transported over their roads at or in the city of Council Bluffs, and prohibits the making of such transfers at Omaha; *held*, to be in conflict with the constitution of the United States and certain acts of Congress regulating inter-state commerce, and therefore void. BECK, J., *dissenting*. 2. The building and operating of a railroad upon the streets of Council Bluffs being authorized by the state "right of way act," an ordinance of the city imposing conditions and restrictions upon such building and operation of the railroad, will not raise a contract between the railroad company and the city, to comply on the part of the former with such conditions and restrictions.

Homestead—Abandonment by Widow—Liability for Debts.—*Johnson v. Gaylord*; Supreme Court of Iowa. Opinion by Beck, J. Upon the abandonment of a homestead by the widow, after the decease of the owner, who leaves heirs, it is not liable to debts of the estate other than those which would bind the homestead in the life of the owner, and does not become assets in the hands of the administrator.

Railroads—Liability for acts of Employees—Does not exist—when—*Porter v. Chicago, etc. R. Co.*; Supreme Court of Iowa. Opinion by Cole, J. When the employees of a railroad company discovered obstructions upon its track and just at that point also saw the plaintiff running from the obstructions as the train approached, and thereupon the employees stopped the train, left it, pursued, overtook and arrested the plaintiff, put him on the train, and carried him twenty-five miles under arrest, past several stations, and then, upon further questioning they concluded there was not sufficient evidence to hold him for trial, and thereupon they conveyed him, free, back to his home, near the place of arrest. *Held*, that in the absence of any authority from defendants, except the employment to run its trains, it is not liable for such acts of its employees; that the acts were not in any manner connected with the use and operation of the railroad, so as to make defendant liable therefor, neither under the Iowa Statute (Code, Sec. 1307) or the common law.

Contract of Ordinance, Nature of—License—Construction of.—*Des Moines v. Chicago, etc., R. R. Co.*; Supreme Court of Iowa. Opinion by Cole, J. 1. An ordinance passed by a city granting a railroad company the right to lay its track upon, and operate its road over a toll bridge subject to certain regulations specified in the ordinance, is a contract, so far as that the city may not by a subsequent ordinance require the payment of toll in addition to the regulations required by the original ordinance. 2. If such grant should be construed as a license, nevertheless the plaintiff could not recover for tolls required by its new ordinance, without first revoking the license. 3. An ordinance granting a railroad company the right to lay its track and operate its railroad over a toll bridge, gives to such company the right to operate its railroad for doing all its business, although such business may have been donbled after the grant, by the building of a branch-road and feeder to its main line.

Liability of Administrator de son Tort.—*Madison v. Shockley et al.*; Supreme Court of Iowa. Opinion by Beck, J. 1. When the widow and heirs appropriated the assets of the estate to their own use, and no property came into the hands of the administrator, they will be held liable in an action by the creditors, as administrators *de son tort*, to the extent of the value of the property that came into their hands. 2. In such a case, it is no defense to the action that an administrator had been appointed, when he had received no *assets*.

Railroad Fences—Injury to Animals.—*Warner v. Keokuk etc., R. Co.*; Supreme Court of Iowa. Opinion by Day, J. Where a party pastures an animal in a field bordering upon a railroad, and it escapes upon the railroad track through a defective fence and is killed, his right of action against the railroad company cannot be defeated on the ground that the owner of the field had entered into a contract with the railroad company wherein he agreed to maintain the fence.

Common Carrier—Baggage—Passenger—*Green v. Milwaukee etc R. Co.*; Supreme Court of Iowa. Opinion by Day, J. 1. In order that the relation of common carrier and passenger may exist, and a railroad company become liable for baggage, it is not necessary that one should place himself in such position that he may not withdraw his baggage and determine not to take passage. The question is, not what the party might do, without incurring legal liability, but what did he intend to do, as evidenced by all the facts and circumstances. 2. Where the plaintiff advised defendant's agent that she intended taking passage on defendant's train, early the following morning, and sent her trunk to the depot that evening, properly marked, which was afterwards locked up in defendant's baggage room, the jury were justified in finding there was an acceptance of the trunk by defendants.

Notice to Unincorporated Association, where Knowledge fraudulently concealed by member.—The Supreme Court of Pennsylvania has just decided an important point concerning notice to an unincorporated association, binding upon the society, though knowledge thereof was fraudulently concealed by one of its members; *Stockdale, Tr., v. Keyes et al* [2 Week. Not. Cas. 201.]* A partnership in the course of business gave two notes to D., who had the same discounted at an unincorporated bank in which he was both a stockholder and director. The notes were duly paid at maturity, but D. renewed the same without the knowledge of the firm, with a third note endorsed by an agent of the firm, who, however, exceeded his authority therein. In assumpsit upon a note given in part renewal of the latter note: *Held* (affirming the court below) that the unincorporated bank was charged with the knowledge fraudulently concealed by D., and therefore could not recover against the firm.

Partnership — Evidence — Trustee — Fraud — Moore v. Thomas, to use:—Supreme Court of Pennsylvania. [2 Week. Not. Cas. 206.] In an action for work done at a colliery for a firm of which the defendant was alleged to have been a member, the defendant lessee alleged that he had taken the lease at the request of his brother, in order to defeat the claims of his brother's creditors, the brother having, it was stated, paid the money. The court charged, that, if the defendant was a party to the fraud, he was liable, and that the evidence must prove him to have been his brother's agent and acting within the scope of his authority. A verdict was given for the plaintiff, and, on appeal, *held*, that the charge of the court was not erroneous. See Thomas v. Moore, 71 Penn. St. 193.

Validity of Bond, as to Subsequent Creditors, given by Insolvent to his Family for Valuable and Legal Consideration.—Fraud enters so frequently into the arrangements of insolvents, when providing for their families, that attention may well be given to the noticeable exception in *Boyd's appeal*, in the Supreme Court of Pennsylvania, [2 Weekly Notes.] The facts found by the auditor were as follows: Edward Heazelton died in 1871. Prior to his death, in October, 1853, he made a voluntary assignment for the benefit of his creditors. Being then without means for the support of his family, forty-five hundred dollars were contributed for their support by his friends, who, on October 8, 1853, executed to John P. Kramer a deed of trust of which the following are the material portions: "We, the subscribers, do agree to contribute the sums severally annexed to our names, expressly and solely for the purpose of affording relief and support to the family of Edward Heazelton, and the means of educating and supporting such family as

*The Western Jurist. DesMoines, Ia.: Mills & Co.

*Weekly Notes of Cases. Kay & Bro., Philadelphia.

he may hereafter have, and in no manner or way for the interest or advantage of Edward Heazelton, except only a maintenance to be allowed him for his services rendered . . . also, that we will pay over to John P. Kramer the several sums as above stated, taking his receipt for the same, redeemable in five years, without interest, *provided* he engage to employ the said Edward Heazelton . . . . as agent to trade, barter, buy, and sell in the name of said John P. Kramer, for the above-mentioned purposes, and for no other purpose, allowing him only a reasonable support for services rendered. . . . *Provided furthermore*, that, in the case of the death of the said Edward Heazelton, before the aforesaid capital is entirely redeemed, . . . said business, be it what it may, shall be continued under the direction and friendship of the contributors of a major part of said trust remaining unsatisfied for the purposes above specified; again, when said capital shall have been entirely redeemed . . . . the proceeds and stock remaining shall accrue to the benefit and use of the family of the said Edward Heazelton, he being hereby in such event appointed the guardian and trustee of the same for their use as long as he shall live, and for the equitable and fair distribution to the widow and children after his demise." Kramer accepted the trust on October 8, 1853. Shortly after, Heazelton opened a grocery store, putting up his own name as the sign, and making out the bills in his own name. Suits for the collection of debts were, however, brought in the name of John P. Kramer, trustee. The business continued thus until Heazelton's death. On December 11, 1867, he (upon his own application) was adjudged a bankrupt, and on March 12, 1868, he was discharged from all debts contracted prior to his application. On June 19, 1868, Heazelton had an appraisement made of his stock on hand, amounting to forty thousand nine hundred and eleven dollars over and above liabilities. Heazelton then purchased the stock from Kramer at the valuation, and in payment gave his bond, dated July 28, 1868, for that amount, the condition being that Edward Heazelton, his heirs, executors, administrators, etc., should cause to be paid unto John P. Kramer in trust for the wife of Heazelton and his children then born, or thereafter to be born, the sum of forty thousand nine hundred and eleven dollars in twenty years after date, unless the death of the said Edward Heazelton should sooner occur, in which event the said sum should thereupon fall due, and become payable without any fraud or further delay. The sums furnished by the contributors executing the deed of trust, had all been, with one exception, previously paid off. Heazelton died largely insolvent. His family claimed a *pro rata* dividend on this bond, which was resisted by the creditors. The auditor (Robb) rejected the claims on the bond. His report was overruled by the court, and the matter referred back to him to make distribution, awarding a *pro rata* dividend on the bond. Such a dividend ($17,080.34) having been reported, the second report of the auditor was confirmed, whereupon the creditors took this appeal. The court, affirming this decree, used the following language: "We discover in this case no sufficient evidence of fraud in the concoction of the bond to set it aside in favor of creditors. Nor is there any want of valuable and legal consideration to render it irrevocable. The trust for the benefit of the family of Edward Heazelton was valid. The money belonged to the subscribers, and the business founded upon it was governed by the trust they stamped upon the money. When Heazelton bought out this business and its avails, he stood in the attitude of any other person purchasing it. There is no evidence to impugn the fairness of the transaction, while ample evidence supports it. The family of Edward Heazelton are interested in this bond as the former *cestuis que trust*, and therefore creditors, and prior in time in point of fact, and equally entitled to come in with other creditors upon the estate."

Legal News and Notes.

—Mr. William Fegg, of London, is compiling a volume of curious and eccentric wills.

—Mrs. General Gaines has arrived in Washington to attend to the prosecution of a suit before the supreme court. She says she has been engaged in litigation concerning her interests forty-four years, and spent three fortunes.—*New York Herald.*

—The Lancaster County (Nebraska) Bar Association gave a dinner to the judge of the Supreme Court and of the local courts, at the Tichenor House at Lincoln, on New Year's eve. We understand it was a very enjoyable affair; but we do not see how the judges dare to dine with the members of the bar, in view of the fact that that model of journalistic truth and purity, the New York *Herald*, lately overhauled the judges of the United States Supreme Court for committing a like indiscretion.

—The *Louisiana Law Journal* is a new candidate for the good will of the profession. It comes from New Orleans once a month, and is devoted to law and literature, the latter term being used in a very broad sense. It is to contain notes of the current decisions of the courts situated in that state; and certainly the field is broad enough as the circuit, and courts of the United States are in session eight months, while the supreme court of the state holds uninterrupted sessions from the first of November to the first of June, and in addition there are many minor courts whose decisions are of a local value. The publishers close with the remark "a first-class journal would seem within immediate reach; the material is at hand." Let us hope the subscribers will find the publishers successful in reaching it. It is very creditable in its general appearance.

—Judge Doolittle, of Illinois, thus describes his first entry into the chamber of the Supreme Court of the United States: "Imagine to yourselves a youth just fresh from the schools, imbued with that respect for the institutions of our country which every youth was then taught to cherish next to the sentiments he felt toward the God of Heaven. Entering that chamber forty years ago, there sat the judges, clothed in their robes. The chamber was still. Not a voice was heard nor a whisper, except of the counsel who was speaking, and that counsel was Daniel Webster. It was in the case of the Charles River bridge. There was the great counsel, with his face lit up, beaming with every expression of the soul. Listening with deep interest to the great lawyer of the constitution, Daniel Webster himself, you can imagine the effect upon a youth under such circumstances."

—A great scandal is exciting social and legal circles in New York, in which the principal figure is Hon. Charles H. Van Brunt, one of the justices of the supreme court of that State. On the 26th day of December, 1874, Judge Van Brunt was divorced from his wife, Amelia C. Van Brunt, on her petition, on account of "several acts of adultery." The custody of the children was given to Mrs. Van Brunt. $4,000 a year were awarded to her as alimony, and it was decreed that "it shall be lawful for the said Amelia C. Van Brunt to marry again in the same manner as though the said defendant, Charles H. Van Brunt, was actually killed. But it shall not be lawful for the said defendant, Charles H. Van Brunt, to marry again until said plaintiff is actually dead." Now the scandal consists in the fact that Judge Van Brunt has married again, and to a lady of estimable family. The marriage took place last summer in Cambridge, England, in the presence of a hundred persons, and seems to have been duly solemnized by two clergymen of the established church. The scandal is complicated by the fact that Judge Van Brunt has denied the marriage, no doubt fearing that he might be punished for contempt of the court whose decree he has disregarded; but he is said to have taken legal advice in England as to its validity, before entering into it. Whether the second marriage is, in point of law, valid or not, there can be little doubt of the immorality of bed and board divorces, or of divorces which lay a restraint against marriage upon one of the parties. The wise policy which encourages marriages in order to prevent immorality, ought, for the same reason, to discourage such divorces.

—A Curious Will.—The following will was filed in Doctors' Commons, London, in the seventeenth century:

"I, Philip, V. Earl of Pembroke and Montgomery, being as I am assured, of unsound health, but of sound memory, as I well remember me that five years ago I did give my vote for the dispatching of old Canterbury, neither have I forgotten that I did see my king upon the scaffold; yet it is said that death doth even now pursue me, and moreover, as it is yet further said that it is my practice to yield under coercion, I now make my last will and testament. *Imprimis:* As for my soul, I do confess I have often heard men speak of the soul, but what may be these same souls, or what their destination, God knoweth; for myself, I know not. Men have likewise talked to me of another world which I have never visited; nor do I know even an inch of the ground that leadeth thereto. When the king was reigning, I did make my son wear a surplice, being desirous that he should become a bishop; and, for myself, did follow the religion of my master; then came the Scotch who made me a Presbyterian; but, since the time of Cromwell, I have become an Independent. These are, methinks, the three principal religions of the kingdom. If any one of the three can save a soul, I desire they will return it to him who gave it to me. Item: I give my body, for it is plain I can not keep it, as you see the chirugeons are tearing it to pieces. Bury me, therefore: I hold lands and churches enough for that. Above all, put not my body beneath the church-porch, for I am, after all, a man of birth, and I would not that I should be interred there where Colonel Pride was born. Item: I will have no monument, for then I must needs have an epitaph, and verses over my carcass. During my life I had enough of these. Item: I desire that my dogs may be shared among all the members of the council of state. With regard to them, I have been all things to all men; sometimes went I with the peers, sometimes with the commons. I hope, therefore, they will not suffer my poor curs to want. Item: I give my two best saddle horses to the Earl of Denbigh, whose legs, methinks, must soon begin to fail him. As regards my other horses, I bequeath them to Lord Fairfax, that, when Cromwell and his council take away his commission, he may still have some *horse* to command. Item: I give all my wild beasts to the Earl of Salisbury, being very sure that he will preserve them, seeing that he refused the king a doe out of his park. Item: I bequeath my chaplain to the Earl of Stamford, seeing he has never had one in his employ, having never known any other than his son, my Lord Grey, who, being at the same time spiritual and carnal, will engender more than one monster. Item: I give nothing to my Lord Saye, and I do make him this legacy willingly, because I know that he will faithfully distribute it unto the poor. Item: Seeing that I did menace a certain Henry Mildmay, but did not thrash him, I do leave £50 to the lackey that shall pay unto him my debt. Item: I should have given to the author of the libel on women, entitled 'News of the Exchange,' threepence, to invent a yet more scurrillous mode of maligning; but, seeing that he insulteth and slandereth, I know not how many honest persons, I commit the office of paying him to the same lackey who undertaketh the arrears of Henry Mildmay. He will teach him to distinguish between honorable women and disreputable women. Item: I give to the Lieutennant-General Cromwell one of my words, the which he must want, seeing that he hath never kept any of his own. Item: I give to the wealthy citizens of London, and likewise to the Presbyterians and nobility, notice to look to their skins, for, by the order of the state, the garrison at Whitehall hath provided itself with poniards, and useth dark-lanterns in the place of candles. Item: I give up the ghost."